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In The
# Supreme Court of the United States

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*Petitioners,*

v.

MCDERMOTT INTERNATIONAL, INC., MCDERMOTT UNDERWATER SERVICES, INC., CCC FABRICACIONES Y CONSTRUCCIONES, S.A. DE C.V., and CORPORACION DE INDUSTRIAS CONSTRUCCIONES, S.A. DE C.V.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In a state court action under the Jones Act, 46 U.S.C. App. § 688, are injured seamen entitled to a jury determination of the validity of purported releases?

## STATEMENT REGARDING PARTIES

All parties to the proceeding in the court below are listed in the caption of the case.

Ron Rozmarynowski is a plaintiff in the trial court and was accordingly listed in the caption in the court below, but he was not a party to this appeal because he did not sign a release.

Additional parties were originally defendants in the trial court and were accordingly listed in the caption in the court below, but they were not parties to this appeal.

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## PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request this Court to grant their petition for a writ of certiorari to review the judgment of the Louisiana Court of Appeal for the Fourth Circuit.

## OPINIONS BELOW

The opinion of the Louisiana Court of Appeal, Fourth Circuit, has not been reported. It is reprinted as Appendix A, *infra*, at App. 1.

The order of the Louisiana Supreme Court denying discretionary review has not been reported. It is reprinted as Appendix B, *infra*, at App. 3.

The order and opinion of the Civil District Court for the Parish of Orleans has not been reported. It is reprinted as Appendix C, *infra*, at App. 5.

The opinion of the Louisiana Court of Appeal, Fourth Circuit, in an earlier appeal has been reported as *Coto v. J. Ray McDermott, S.A.*, 772 So.2d 828 (La. App. 2000). It is reprinted as Appendix D, *infra*, at App. 7.

## JURISDICTION

The Louisiana Court of Appeal, Fourth Circuit, entered judgment on April 22, 2003. The Louisiana Supreme Court denied a timely application for discretionary

review on September 26, 2003. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See also infra* at 7 n.4.

## RELEVANT STATUTORY PROVISIONS

The Jones Act, 46 U.S.C. App. § 688, provides in relevant part as follows:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

## STATEMENT OF THE CASE

Petitioners are twelve crew members of the Derrick Lay Barge 269 (DLB-269), which sank in the Bay of Campeche, off the coast of Mexico, during Hurricane Roxanne on October 15, 1995. Respondent McDermott Underwater Services, Inc. (referred to, together with respondent McDermott International, Inc., as "McDermott") employed the eleven petitioners who are U.S. citizens. Respondent Corporacion de Industrias Construcciones, S.A. de C.V. ("CIC") employed petitioner Guillermo Carrizales-Cortez, who is a Mexican citizen and a permanent resident of the United States. Respondent CCC Fabricaciones y Construcciones, S.A. de C.V. ("CCC") owned the DLB-269, which CCC and McDermott operated together as joint venturers.

Approximately 250 crewmen survived the sinking of the DLB-269 and waves of twenty-five to thirty-feet in which they struggled to stay alive. They were rescued in stages over the next two days. Within a week of the rescue, McDermott invited the twenty U.S. survivors and their families to a "Heroes Banquet" in New Orleans to celebrate their survival. Don Terry, the pr sident of McDermott Underwater Services, met the crew in New Orleans just twelve days after the disaster and suggested that they settle their claims. (Unbeknownst to petitioners, McDermott had prepared release documents and had organized videographers to film their signing.) Terry threatened the men that, if they did not settle, they would lose their overseas jobs. He discouraged them from hiring lawyers and suggested that the whole diving industry, including their brother divers, would suffer if they filed suit. Terry deceived the U.S. survivors in several respects, lying about the amounts of the settlements agreed to by crew members in a similar disaster; telling the crew that any claims they filed would be transferred to a Mexican court where there would be no recovery; and promising that actions would be taken to prevent future disasters if they settled.

When the U.S. survivors declined to settle for less than $500,000 each, Terry replied, "We are too far apart, ya'll just go party down" at the Heroes Banquet. Throughout the banquet and during the night, McDermott personnel encouraged them to drink and drink excessively. The men were also advised that they would receive $75,000

each to sign the releases.[1] There was no back and forth negotiation.

The U.S. survivors were instructed to meet the next morning to sign the releases. Many were still drunk. Some were still drinking the next morning. Six of the present petitioners (and four other crewmen who are not parties to the present action) nevertheless signed releases immediately, and the remaining U.S. petitioners signed releases in the ensuing days and weeks. None had a full understanding of their rights when they signed the release documents. Although all of the petitioners were suffering from post-traumatic stress disorder, and Terry recognized that they might have needed psychiatric counseling at the time, McDermott did nothing to determine whether the crew members had sufficiently recovered from the trauma to be mentally capable of settling their claims.

Guillermo Carrizales-Cortez, as a Mexican national, received less subtle treatment. On the same weekend that McDermott was orchestrating the U.S. releases, the Mexican crewmen were summoned to CCC's offices. They were told that they would need to sign a document to receive their accrued pay and were promised additional financial help once they signed. The crewmen were then individually escorted into a back room where – in the presence of two men armed with sub-machine guns – they were given the document to sign. They were not allowed to read the document, nor were they told that it was a

[1] A Louisiana trial court determined that the value of the claim of another U.S. survivor who had not signed a release was over $966,000 – more than twelve times the amount offered to petitioners. *See Nielsen v. Northbank Towing, Inc.*, 768 So.2d 145, 151 (La. App. 2000).

release of liability. After signing, they received the accrued pay that was owed to them and an additional 10,000 pesos (approximately $3,000). They were then escorted out the back door so that they could not communicate with fellow crew members. In signing the document, Mr. Carizales-Cortes did not intend to release either CCC or McDermott, but the document purports to release them both.

Sooner or later, petitioners all sought psychiatric help. One of the treating psychiatrists has testified that they were not psychologically fit to make such an important decision when they signed the releases, that they were suffering from post-traumatic stress disorder at the time (although they did not realize it), and that they had been victims of manipulation, coercion, sleep deprivation, and intoxication.

Petitioners filed the present action in a Louisiana state court under the Jones Act, 46 U.S.C. App. § 688, and the general maritime law. Petitioners asked for a jury trial on all issues. Meanwhile, other survivors have filed their own actions in various forums. The largest group, consisting of approximately 180 Mexican nationals, have filed claims in Texas against their employer, CCC. These cases are being tried before Texas juries in blocks of ten. In the only case to go to trial thus far, the jury found the releases to be invalid.[2]

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[2] Because the circumstances under which the releases were obtained differed according to the crewman's nationality (*cf. supra* at 4), the Texas jury's finding of invalidity is more significant for Mr. Carizales-Cortes than it is for the eleven U.S. petitioners. It is highly relevant for all twelve petitioners, however, that the jury – not the court – is

(Continued on following page)

Respondents in the present action asserted the affirmative defenses of compromise and release.[3] Despite petitioners' request for a jury trial, the trial court ruled that the validity of the releases would be tried to the bench. The trial court reasoned that the availability of a jury trial on this issue was a procedural matter on which state law applied, although the actual validity of the releases was admittedly governed by federal law. *See infra*, App. 5.

Petitioners sought review on this issue in the state court of appeal, which affirmed on the ground that "[t]he trial court properly exercised its discretion" under state procedural law. *See infra*, App. 1. The Louisiana

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deciding on the validity of the releases in the Texas actions. *See infra* at 5.

[3] Respondents originally moved for summary judgment based on the releases, and the trial court granted the motion. In an earlier appeal, the state court of appeal ruled that there were genuine issues of material fact with respect to the video release sessions of each seaman, the adequacy of the consideration, and the adequacy of advice and representation. This precluded the granting of summary judgment. *See Coto v. J. Ray McDermott, S.A.*, 772 So.2d 828 (La. App. 2000); *infra* App. D. This earlier appeal and others, did not involve the issue presented in this petition.

Supreme Court denied discretionary review. *See infra*, App. 3.[4]

## REASONS FOR GRANTING THE PETITION

The court below ignored controlling decisions of this Court in holding that the trial judge may displace the jury to rule on the validity of petitioners' purported releases. In so doing, it treated petitioners less favorably on an important issue than the Texas courts have treated other seamen injured in the same incident. This Court should either review the decision below on the merits or summarily reverse it under long-standing precedents.

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[4] Although the trial court has not yet rendered a final judgment in this action, the judgment below is sufficiently "final" for purposes of 28 U.S.C. § 1257(a) to vest this Court with certiorari jurisdiction. This Court has long taken a pragmatic approach to construing § 1257(a). *See generally* R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 3.5, at 144-46 (8th ed. 2002) (collecting cases). Whether the judge or the jury determines the validity of the releases is a separable and collateral matter, distinct from the underlying merits of the case (*i.e.*, whether respondents are liable to petitioners and the extent of the damages). *See, e.g., id.* § 3.6.

This Court's decision in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), is closely analogous. In *Miller*, the Louisiana Supreme Court had ruled that the defendant could not rely on the doctrine of *forum non conveniens*. It accordingly reversed the trial court's grant of a *forum non conveniens* motion and remanded the case for trial. This Court granted certiorari to review the defendant's separable and collateral claim that under the doctrine of *forum non conveniens* it should not be required to face trial in Louisiana.

## I. The decision below is in conflict with the governing decisions of this Court

The proper resolution of this case required nothing more than the application of a simple syllogism in which this Court has already addressed both of the premises supporting the conclusion. Unfortunately, the courts below chose to ignore this Court's teachings.

### A. An injured worker is entitled to a jury trial on the validity of a release under the Federal Employers Liability Act as a matter of substantive law

In *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952), an injured railroad employee sought personal injury damages under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60, in an Ohio court. The defendant claimed that it was protected by "a written document signed by [the plaintiff] purporting to release [the defendant]." 342 U.S. at 360. The jury implicitly found the release to be invalid and awarded damages to the plaintiff. The trial court, applying the state's local procedural rules, held that the validity of the release was a question for the court – not the jury – and entered judgment for the defendant notwithstanding the verdict. This Court reversed. It held "that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used." 342 U.S. at 363. In other words, the injured worker was entitled to the *jury*'s determination of the validity of the release, notwithstanding the state's local procedural rule to the contrary.

Subsequent FELA cases have confirmed that an injured worker is entitled to a jury resolution of every issue of disputed fact. *See, e.g., Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957).

### B. The Jones Act incorporates the Federal Employers Liability Act, including judicial interpretations, by reference

The Jones Act provides that "all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply" in a seaman's personal injury action under the Act. 46 U.S.C. App. § 688(a). From the earliest days, this Court has recognized that the quoted language incorporates the Federal Employers Liability Act ("FELA"), 45 U.S.C. §§ 51-60, into the Jones Act by reference. In its first Jones Act case, the Court explained:

> The reference, as is readily understood, is to [FELA] and its amendments. This is a recognized mode of incorporating one statute or system of statutes into another, and serves to bring into the latter all that is fairly covered by the reference.

*Panama R.R. Co. v. Johnson*, 264 U.S. 375, 391-392 (1924). *See also, e.g., Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 324 (1927); *Engel v. Davenport*, 271 U.S. 33, 35-36 (1926). More recent examples of the continued recognition that the Jones Act incorporates FELA include *American Dredging Co. v. Miller*, 510 U.S. 443, 455-56 (1994), and *Miles v. Apex Marine Corp.*, 498 U.S. 19, 23-24 (1990).

Because Congress intended to apply FELA's rules in Jones Act cases, it logically follows that the judicial interpretations of FELA also apply to the Jones Act.[5] As JUSTICE SCALIA wrote for the Court in *American Dredging*, "the Jones Act adopts 'the entire judicially developed doctrine of liability' under [FELA]." 510 U.S. at 456

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[5] An exception to this general rule can be made in the rare case when a FELA rule is logically limited to the railroad context or logically inapplicable in the maritime context. In *Cox v. Roth*, 348 U.S. 207 (1955), for example, the Court noted that FELA does not explicitly provide for the survival of actions against deceased tortfeasors. Such a provision would have been logically unnecessary in the railroad context. The *Cox* Court nevertheless held that the death of the employer would not defeat a Jones Act claim. *Id.* at 208-09. *See also The Arizona v. Anelich*, 298 U.S. 110, 123-24 (1936) (holding that the FELA assumption-of-the-risk rule tied to the railroad-specific Federal Safety Appliance Act does not apply under the Jones Act); *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 377 (1932) (holding that the administrator of a deceased seaman could bring a Jones Act action based on the master's failure to provide proper care even though a FELA employer was not subject to such a duty because the duty was recognized under the general maritime law).

The *Cox* exception to the general rule is irrelevant here. The validity of a release could arise in any personal injury action. Indeed, the issue has regularly arisen in both the Jones Act and FELA contexts. *See, e.g., Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1952) (FELA case); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942) (Jones Act case). The FELA rule giving the injured worker a right to a jury trial on this question is neither logically limited to the railroad context nor logically inapplicable in the maritime context.

Moreover, in every Jones Act case in which this Court has declined to follow the FELA rule, the effect has been to give *greater* protection to the injured seaman. This is in keeping with the long-standing rule that seamen are "wards of the admiralty," *Harden v. Gordon*, 11 F. Cas. 480, 485 (C.C.D. Me. 1823) (No. 6047) (Story, J.), and thus deserving of special protection. *See, e.g., U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351, 355 (1971); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 247 (1942); *Robertson v. Baldwin*, 165 U.S. 275, 287 (1897).

(quoting *Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958)). In *Miles*, JUSTICE O'CONNOR similarly explained that when Congress "incorporat[ed] FELA unaltered into the Jones Act" the judicial "gloss" on FELA was intended to be part of the package. 498 U.S. at 32.

There are many examples of this Court's applying an established interpretation of FELA when construing the Jones Act. Most recently, the *American Dredging* Court "th[ought] it evident that the rule which *Mayfield* announced for the FELA [regarding *forum non conveniens*] applies as well to the Jones Act." 510 U.S. at 456 (citing *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950)). "The decisive question in" *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), was "whether the principles developed in [a] line of FELA cases" would be extended to the Jones Act or limited to the FELA context. 355 U.S. at 436. The *Kernan* Court held that the FELA principles should be extended to the Jones Act, notwithstanding a strong dissent arguing that the relevant FELA principles were logically limited to the railroad context. And in *Hopson v. Texaco*, 383 U.S. 262, 264 (1966) (per curiam), the Court confirmed that the broad definition of "agents" announced in *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 331-332 (1958), a FELA case, also applied under the Jones Act.

It is particularly appropriate for the *Dice* rule to apply under the Jones Act, for the *Dice* Court explicitly relied on the leading Jones Act case governing the validity of releases to reach its conclusion that federal law governed. *See Dice*, 342 U.S. at 361 (citing *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942)). The *Dice* Court itself saw that the same rule applies in the Jones Act and FELA contexts.

### C. It necessarily follows that an injured seaman is entitled to a jury trial on the validity of a release under the Jones Act as a matter of substantive law

By incorporating FELA and its judicial interpretations, the Jones Act adopts the *Dice* rule granting an injured worker the right to have a jury determine the validity of a purported release. Thus an injured seaman is entitled to a jury trial on the validity of a release under the Jones Act as a matter of substantive law.

## II. The decision below is in conflict with the decisions of the Texas courts with respect to other seaman injured in the same incident

It is well-recognized that this Court regularly exercises its certiorari jurisdiction, particularly in statutory cases, in order to resolve conflicts in interpretation. The goal is to ensure that similarly situated parties are treated in the same way, regardless of where their cases are heard.

The need for this Court's intervention here is not based solely on an abstract concern that similarly situated parties might be treated differently as the result of conflicting precedents. A much more concrete disparity has already arisen. Different crewmen on the DLB-269 who were injured in precisely the same incident are already being treated differently depending on which court is hearing their cases. While Texas juries are determining the validity of the releases for the largest group of DLB-269 survivors, *see supra* at 5, the Louisiana courts have denied petitioners their right to a jury trial on the same issue.

In *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam), this Court demonstrated the extraordinary steps it was willing to take to ensure that two groups of maritime workers injured in the same incident would not be subject to different legal results depending on the court that decided the case. *See id.* at 27 (justifying summary reversal on a second petition for rehearing in part because "[s]ubsequent to our orders in the present case, the Court of Appeals for the Fourth Circuit upheld an award to the survivors of another employee killed in the same accident.") No such extraordinary measures are required here, but the Court should be motivated by the same desire to ensure that similarly situated parties are treated in the same way, regardless of where their cases are heard. Petitioners should have the same jury trial rights as their injured shipmates who have sued in Texas.

## III. The availability of a jury trial is an important issue under the Jones Act

The central importance of the right to a jury trial under the Jones Act is underscored by the statutory language, which grants an injured seaman an action for damages "with the right of trial by jury." 46 U.S.C. App. § 688(a).

This Court has often recognized the importance of this issue, having repeatedly held that factual questions under the Jones Act are to be determined by the jury.[6] *See, e.g.*,

[6] This Court has, of course, recognized that "'summary judgment or a directed verdict is mandated where the facts and the law will

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*Chandris, Inc. v. Latsis*, 515 U.S. 347, 369 (1995); *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 (1991); *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 355-56 (1991); *Fitzgerald v. United States Lines*, 374 U.S. 16, 21 (1963); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 374 (1957).

Indeed, the ability of an injured seaman to have a case heard by a jury is such a central feature of the Jones Act that this Court has summarily reversed lower court decisions denying injured seamen this right. *See also infra* at 15 n.7.

## IV. If this Court prefers not to devote any oral argument time to this issue, it should summarily reverse the decision below

Because this Court has clearly established that injured seamen are entitled to a jury trial on the validity of their purported releases, it may be unnecessary to devote further oral argument time to this issue. This case would be an appropriate candidate for summary reversal.

Petitioners recognize that summary reversal is an extraordinary remedy that this Court generally uses only a few times each Term. But petitioners have demonstrated

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reasonably support only one conclusion.'" *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554 (1997) (quoting *McDermott International, Inc. v. Wilander*, 498 U.S. 337, 356 (1991)). In this case, however, the state courts have already held that there are genuine issues of material fact on the validity of the releases that preclude summary judgment. *See Coto v. J. Ray McDermott, S.A.*, 772 So.2d 828 (La. App. 2000); *infra* App. D. The sole basis under federal law for removing this issue from the jury simply does not apply.

their clear entitlement under this Court's precedents to a jury trial here.

Moreover, this Court has a long history of summarily reversing lower court decisions denying the benefits of the Jones Act to injured seamen. *See, e.g., Hopson v. Texaco, Inc.*, 383 U.S. 262 (1966) (per curiam); *Tipton v. Socony Mobil Oil Co., Inc.*, 375 U.S. 34 (1963) (per curiam). Summary reversals have been particularly common when this Court has perceived that a lower court was denying an injured seaman access to a jury's determination of a disputed factual issue. *See, e.g., Butler v. Whiteman*, 356 U.S. 271 (1958) (per curiam); *Gianfala v. Texas Co.*, 350 U.S. 879 (1955) (per curiam).[7]

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[7] FELA, which Congress incorporated into the Jones Act by reference, *see supra* at 9, also has a long history of summary reversals, particularly on issues implicating the right to a jury trial. *See, e.g., St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409 (1985) (per curiam) (protecting the right to have the jury decide an issue); *Davis v. Baltimore & Ohio R.R. Co.*, 379 U.S. 671 (1965) (per curiam) ("the Court of Appeals improperly invaded the function and province of the jury"); *Dennis v. Denver & Rio Grande Western R.R. Co.*, 375 U.S. 208 (1963) (per curiam) ("[the appellate court] could not properly substitute its judgment for that of the jury"); *Harrison v. Missouri Pacific R.R. Co.*, 372 U.S. 248 (1963) (per curiam) ("We think that the Illinois courts improperly invaded the function and province of the jury in this case.").

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 26, 2003

**APPENDIX A**

**NO. 2003-C-0327**

**COURT OF APPEAL, FOURTH CIRCUIT**

**STATE OF LOUISIANA**

**VICTOR DIAZ, ET AL.**

**VERSUS**

**J. RAY MCDERMOTT S.A., ET AL.**

| | |
|---|---|
| IN RE: | VICTOR DIAZ, ET AL. |
| APPLYING FOR: | SUPERVISORY WRIT |
| DIRECTED TO: | HONORABLE GERALD P. FEDOROFF, JUDGE<br>CIVIL DISTRICT COURT,<br>ORLEANS PARISH<br>DIVISION "E", 95-16491 |

**WRIT DENIED**

The trial court properly exercised its discretion in setting defendants' exceptions of res judicate for separate, bench trial. See La. C.C.P. art. 929.

New Orleans, Louisiana this 22nd day of April, 2003.

/s/ DRB
JUDGE DENNIS R. BAGNERIS SR.

/s/ Armstrong, J., Dissents
JUDGE JOAN BERNARD ARMSTRONG

/s/ EAL
JUDGE EDWIN A. LOMBARD

**ARMSTRONG, J., DISSENTS.**

I respectfully dissent. The right to a trial by jury as to the validity of a seaman's release is "part and parcel" of the remedy afforded the seaman under federal maritime law. *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U.S. 359 (1952). Therefore, state court rules, which would deny a jury trial so as to the validity of a seaman's release, are superceded by federal law. *Id. See also Neely v. Hollywood Marine, Inc.*, 530 So. 2d 1116, 1123 (La. 1988).

## APPENDIX B

### The Supreme Court of the State of Louisiana

**VICTOR DIAZ, ET AL.** NO. 2003-CC-1409

VS.

**J. RAY MCDERMOTT S.A., ET AL.**

---

IN RE: Diaz, Victor etal; Rountree, Charles; Cline, Roy Edward; Harris, Richard Webb; Pheffer, Mitchell; Richard, Phillipe; Horschell, Clayton; Richins, Shane Brent; Boettger, Arthur; Noble, Timothy; Chauvin, Ordwayne P.; – Plaintiff(s); Applying for Supervisory and/or Remedial Writs, Parish of Orleans, Civil District Court Div. H, Nos. 95-16491; to the Court of Appeal, Fourth Circuit, No. 2003-C-0327

---

**September 26, 2003**

Denied.

JTK

CDK

JPV

CDT

JLW

CALOGERO, C.J., would grant the writ.

JOHNSON, J., would grant the writ.

Supreme Court of Louisiana
September 26, 2003

/s/ Katherine A. Fontana
**Deputy** Clerk of Court
For the Court

## APPENDIX C

## CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

## STATE OF LOUISIANA

**NO: 95-16491** **DIVISION "H"**
**AD HOC SECTION**

**ODILON CHACHA COTO, ET AL**

**VERSUS J. RAY MCDERMOTT, ET AL**

**REASONS**

There can be no doubt but that federal substantive maritime law applies to the validity of a seaman's release. It is equally well settled that state procedural law is applicable where it does not interfere with this substantive maritime law.

Even in federal court a Jones Act claimant is not absolutely entitled to a jury trial of his case. For example, his claims must yield to the judge's decision in the granting of summary judgment in favor of defendant and a directed verdict at the close of his case.

C.C.P. Article 927 provides that issues of releases are generally to be tried by the court in advance of trial through the Exception of Res Judicata. It remains within the trial court's discretion to refer the exceptions to the merits.

Being mindful of jury time, the confusion in the juror's minds that may result from a trial of the release simultaneously with a trial of the merits, and hoping (perhaps in vain) that a trial of the exception would not be as lengthy or expensive as a trial of the merits, I decline to refer this exception to the merits.

**ORDER**

The Exception of Res Judicata will be heard by the Court without a jury on February 10, 2003, at 10:00 A.M.

/s/ Gerald Federoff
JUDGE GERALD FEDOROFF

## APPENDIX D

| | | |
|---|---|---|
| **ODILON CHACHA COTO; EDIBERTO HERNANDEZ HERNANDEZ; EMEDELIO H. TORRES; HECTOR R. GAMAS; NELLI R. OBANDO, ET AL.** | * | **NO. 99-CA-1866** |
| | * | **COURT OF APPEAL** |
| | * | **FOURTH CIRCUIT** |
| | * | **STATE OF LOUISIANA** |
| **VERSUS** | * | |
| **J. RAY MCDERMOTT, S.A.; MCDERMOTT INTERNATIONAL, INC.; THE AMERICAN BUREAU OF SHIPPING, INC.; CCC FABRIONES Y CONSTRUCCIONES, ET AL.** | * | |

* * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 95-16491, DIVISION "H-12"
HONORABLE MICHAEL G. BAGNERIS, JUDGE

* * *

**JUDGE PRO TEMPORE PATRICK M. SCHOTT**

* * *

(Court composed of Judge William H. Byrnes, III, Judge Patricia Rivet Murray, Judge James F. McKay III, Judge Michael E. Kirby, Judge Pro Tempore Patrick M. Schott)

***MCKAY, J., DISSENTS WITH REASONS***

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**REVERSED AND REMANDED**

Plaintiffs have appealed from summary judgments dismissing their Jones Act and general maritime claims on the basis of releases executed by them in favor of defendants (hereinafter McDermott). The issue is whether the evidence of record shows that there is no genuine issue of material fact to support the conclusion that plaintiffs executed valid seaman's releases according to the standards set out in *Garrett v. Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239 (1942).

Plaintiffs are eleven divers from a crew of twenty divers who were aboard a barge in Mexican waters on October 15, 1995, when it sank in a storm. They were rescued and sent home at the expense of their employer, McDermott. On October 27 McDermott held a meeting with plaintiffs to discuss settlement of their claims and hosted a banquet to celebrate plaintiffs' survival. On the next day ten of the divers including six of the plaintiffs met separately with McDermott's attorney and settled

their claims for $75,000 each. The remaining plaintiffs settled their claims between October 30 and January 30, 1996.

At the October 27 meeting, Don Terry, manager of McDermott's Diving Division made a lengthy presentation to the divers which was preserved on videotape. The subject was payment of compensation to the divers in settlement of any claims by those who had not sustained physical injury. Plaintiffs' version of that presentation is that it contained threats, misrepresentations, and promises of reward that coerced and misled them and left them ignorant of their rights. On the other hand, McDermott views the presentation as a fair, complete, even-handed, and objective outline of all the options available to plaintiffs with a complete and objective explanation of their rights. After the presentation, Terry had the divers meet privately to discuss their claims among themselves. They withdrew and selected a spokesman from their number. They concocted a settlement figure of $500,000 each which their spokesman relayed to Terry and which he rejected. In the meantime the divers learned from J. J. Riddle, another McDermott representative, that McDermott's deductible was $1.5 million. They surmised that McDermott would settle for this total amount among the twenty divers or $75,000 each. After further discussion between representatives of the divers and McDermott, the latter's advised that they would pay $75,000 to each diver interested in settlement. The spokesman reported that at least half of the divers would accept the settlement.

Later that evening McDermott hosted the survival celebration banquet for the dive crew. Following the banquet, the men continued to celebrate with drinking in Terry's hotel room and at French Quarter bars until the

early hours of October 28, 1995. Later that day six of the plaintiffs met separately with McDermott's attorney and settled their claims for $75,000 each. Each meeting was recorded on videotape. Defendants contend that the videotapes prove that plaintiffs had a complete understanding of what they were doing and that they intelligently and freely entered into the settlements. Plaintiffs contend the videotapes prove that they were unfairly led or forced into settlements they did not understand and that they needed their own lawyers to advise them. They also argue that their mental ability was impaired as a result of the all-night partying and drinking the night before, but McDermott argues that the videotapes disprove this argument.

In *Stalnaker v. McDermott Corp.*, 505 So. 2d 139 (La. App 4 Cir. 1987) this court reviewed a summary judgment that dismissed a seaman's suit on the basis of a release he had given to the defendant. The court recognized that the substantive law applicable to the validity of a seaman's release is from federal admiralty jurisprudence, but the procedural device of summary judgment is governed by Louisiana law. In *Garrett v. Moore-McCormack Co., supra,* the United States Supreme Court provided the following legal standard governing the validity and enforceability of an unrepresented seaman's release:

> The burden is upon one who sets up a seaman's release to show that it was executed freely, without deception or coercion, and that it was made by the seaman with full understanding of his rights. The adequacy of consideration and the nature of the medical and legal advice available to the seaman at the time of signing the release are relevant to an appraisal of this understanding.

In *Stalnaker, supra,* at 140, this court elaborated on pertinent federal maritime law as follows:

> It is well settled that releases are signed by seamen are given the most careful scrutiny. *Halliburton v. Ocean Drilling and Exploration,* 620 F.2d 444 (1980). The support for this principle can be found as early as 1823 wherein Justice Story, sitting on the Circuit, stated:
>
> > "They [seamen] are emphatically the wards of the admiralty; and though not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity accustomed to treat young heirs, dealing with their expectancies, wards with their guardians, and cestuis que trust with their trustees." *Harden v. Gordon,* 11 Fed Cas. At 485 (1Cir. 1823).
>
> Subsequent jurisprudence has termed the release of a seaman precarious, at best, and has clearly laid the burden on the party seeking to uphold the release to show that it was given with an informed understanding by the seaman and an appreciation of the consequences of the release. *Cates v. United States of America,* 451 F.2d 411 (5th Cir. 1971). A release is not valid unless it has been executed without deception or coercion. *Charpentier v. Fluor Ocean Services, Inc.,* 534 F.2d 71 (5th Cir. 1976). On a motion for summary judgment predicated on a seaman's release, the Federal jurisprudence has placed a heavy burden on the shipowner for he must conclusively demonstrate the absence of genuine issues of material fact. *Hallibruton, supra.*

A summary judgment is appropriate only when there is no genuine issue as to material fact. LSA-C. C. P. Art. 966 (B). In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence. *Oakley v. Thebault,* 684 So. 2d 488, 4490 (La. 4 Cir. 1996). A summary judgment is rarely appropriate for a determination based on subjective facts such as intent, motive, malice, knowledge or good faith. *Penalber v. Blount,* 550 So. 2d 577, 583 (La. 1989).

Defendants rely heavily on the videotape of Don Terry's presentation to the divers at the October 27 meeting. As mentioned above each side of this lawsuit argues that the videotape supports its position. This very fact compels the conclusion that the use of the videotape necessarily includes a judgment that Terry was or was not credible, he was or was not being entirely objective, and that he was perceived by his listeners as fair and even-handed or threatening and coercive. These are all subjective reactions by his listeners which must be evaluated in determining what effect is to be given to the presentation. This is fact finding. It constitutes a weighing of evidence and an evaluation of credibility. It is clearly not the stuff out of which a summary judgment is to be made. The same is true of the videotapes made of the men when they were given the releases by McDermott's attorney. McDermott argues that these show that the men understood what they were doing. This is a question to be resolved by the trier of fact. The subjective state of the minds of these men is surely a genuine issue of fact. Indeed, a fair reading of the reasons for judgment by our esteemed brother below demonstrates that findings of fact were implicit in his reasons. For example, he stated, " . . . after reviewing the evidence, the Court is of the opinion that these individuals

were not improperly influenced or coerced by any of the events which preceded the signing of the Receipt and Releases, including any representations made to the divers by their supervisor, Don Terry." He also stated that the videotapes indicate that the documents were executed freely and with full understanding of the individuals' rights. Such observations are typical of a judge in the role of the trier of fact, but they do not support the application of a summary judgment.

An additional problem with McDermott's case is its failure to show that the consideration for the releases was adequate. In the Garrett case the court stated that this was "relevant" to an appraisal of the seaman's understanding of his rights. In this court McDermott argues that the amount paid to each plaintiff was in excess of his annual wage, and while that may be a factor to consider it is not the only one. The question is whether each plaintiff could make an intelligent evaluation of his claim as seen by a judge or jury after a trial and an intelligent estimate as to the length of time which would transpire before his case ripened into a final judgment and his chances for success in the case. These are some of the factors that bear upon the adequacy of any settlement. In any event this is a genuine issue of material fact which precludes summary judgment in this case.

Accordingly, the summary judgments rendered herein are reversed and set aside and the case is remanded to the trial court for further proceedings. All costs of this appeal are assessed against McDermott. The assessment of other costs shall await the outcome of the case.

**REVERSED AND REMANDED.**

**McKAY, J., DISSENTS WITH REASONS.**

I respectfully dissent from the majority's opinion and would affirm the trial court's grant of summary judgment.

Given the risks of litigation, a seaman's release may not be set aside where the amount of the settlement is not clearly inadequate, as the seaman must live with the benefit of his bargain. *Durden v. Exxon Corp.*, 803 F.2d 845 (5th Cir. 1986). While the adequacy of consideration is relevant, the primary concern is whether the seaman has received what the court believes to be an adequate consideration. *Stipelcovich v. Sand Dollar Marine, Inc.*, 805 F.2d 599, 606 (5th Cir. 1986), citing *Bass v. Phoenix Seadrill/78 Ltd.*, 749 F.2d 1154, 1161 (5th Cir. 1985).

In the instant case, each of the appellants met with McDermott's legal representatives and agreed to settle his claim against the appellees for $75,000.00 (the sum was $85,000.00 for Ordwayne Chauvin). The settlement amount was not an arbitrary figure proposed by McDermott but a figure sought by the plaintiffs after McDermott refused their initial demand. The sum of $75,000 was also greater than the annual net income of any of the plaintiffs. This figure does not appear to be clearly inadequate.

Furthermore, the meetings were video taped. The video tapes show the attorneys for McDermott providing each seaman with a thorough and detailed explanation of his legal rights including a discussion of the physical and emotional condition of each, his right to recover damages for physical and emotional injuries, and his release of claims for all injuries including those that might arise later. The plaintiffs were also told they were under no pressure to settle their claims; several members of the dive crew did in fact return to work before settling their

claims. The plaintiffs were all experienced commercial divers and many of them had served in the military. They ranged in age from twenty-six to forty-nine. A number of them had even attended some college. Considering these factors, it appears that the members of the dive crew had an informed understanding of what they were doing.

I believe that the defendants' summary judgment evidence satisfied the burden of establishing that each seaman freely and voluntarily executed his release with a full understanding of his rights as well as the consequences of the releases. Accordingly, I would affirm the trial court's granting of summary judgment.

No. 03-939

Supreme Court, U.S.
FILED
FEB 3 - 2004
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

VICTOR DIAZ, CHARLES ROUNTREE, ROY EDWARD CLINE, RICHARD WEBB HARRIS, MITCHELL PHEFFER, PHILLIPE RICHARD, CLAYTON HORSCHELL, SHANE BRENT RICHINS, ARTHUR BOETTGER, TIMOTHY NOBLE, ORDWAYNE P. CHAUVIN, AND GUILLERMO CARRIZALES-CORTES,

*Petitioners,*

v.

J. RAY McDERMOTT, S.A., McDERMOTT INTERNATIONAL, INC., THE AMERICAN BUREAU OF SHIPPING, INC., CCC FABRICACIONES Y CONSTRUCCIONES, CORPORACION DE INDUSTRIAS CONSTRUCCIONES S.A. de C.V., GEO-TECHNICAL SERVICES, INC., NORTH BANK TOWING CORP., and SEABULK OFFSHORE, LTD.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

When a seaman chooses to file an action under the Jones Act, 46 U.S.C. §688, in a Louisiana state court and requests a jury on the main demand, may the District Judge, pursuant to Louisiana procedure, hear evidence and decide an exception of *res judicata* in a separate, judge trial?

## STATEMENT REGARDING PARTIES

Petitioners are named in the caption.

Respondents, CCC Fabricaciones y Construcciones ("CCC") and Corporacion de Industrias Construcciones S.A. de C.V. ("CIC") are represented by undersigned counsel and hereby submit this Brief in Opposition to Petition for Writ of Certiorari. Pursuant to U.S.S.C. Rule 29(6), CCC advises that it has no parent corporation. CCC is the parent of CIC. No publically held company owns 10% or more of the stock of either CCC or CIC.

Respondents, McDermott International, Inc. and McDermott Underwater Services, Inc., listed as Respondents to Petitioner's Petition for Writ of Certiorari, are represented by separate counsel and are filing a separate Brief in Opposition to Petition for Writ of Certiorari.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents CCC Fabricaciones y Construcciones, S.A. de C.V. ("CCC") and Corporacion de Industrias Construcciones, S.A. de C.V. ("CIC"), respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the opinion of the Louisiana Court of Appeal, Fourth Circuit, attached to the Petition as Appendix A, at App. 1.

## JURISDICTION

On April 22, 2003, the Louisiana Court of Appeal, Fourth Circuit, entered an Order denying petitioners application for a writ of certiorari. Attached to the Petition as Appendix A, at App. 1. On September 26, 2003, the Louisiana Supreme Court denied an application for discretionary review. Order denying writ attached to the Petition as Appendix B, at App. 3.

The Order of the Louisiana Supreme Court merely says that the application for writ of certiorari to the Louisiana Court of Appeal, Fourth Circuit, is denied and makes no comment on the merits. As the Louisiana Supreme Court merely denied petitioners application for writ, the present issue regarding the propriety of a trial to the district court of an exception of *res judicata* may be raised on appeal, after final judgment. Accordingly, the Order is not a final judgment or decree of Louisiana's highest court, and this Court does not have jurisdiction to grant the petition for writ of certiorari. 28 U.S.C. §1257(a).

Respondents understand that McDermott will address jurisdiction in greater detail.

## STATEMENT OF THE CASE

### A. Factual Background

The incidents giving rise to this lawsuit occurred in October of 1995, when the DLB-269 sank off the coast of Mexico during Hurricane Roxanne. Respondent, CCC Fabricaciones y Construcciones S.A. de C.V. (hereinafter "CCC"), a Mexican corporation, was the owner and operator of the DLB-269, and, at the time, was laying an offshore pipeline for Pemex, the Mexican national oil company. Respondent, Corporacion de Industrias Construcciones, S.A. de C.V. ("CIC"), provided labor to CCC and was the employer of Mr. Carrizales. Respondents, McDermott International, Inc. and McDermott Underwater Services, Inc.,[1] provided dive crews which assisted the DLB-269 in laying pipe on the floor of the Bay of Campeche, and the remaining petitioners were members of the dive crew. After the DLB-269 sank, 248 crew members, including all of the petitioners, were rescued at sea and brought to shore.

Shortly thereafter, each of the McDermott plaintiffs was provided travel expenses and flown back to the United States. On October 27, McDermott held a meeting with its employees in New Orleans to discuss possible settlement

[1] It is unclear whether petitioners have named the correct McDermott corporations. This issue will be addressed by counsel for the McDermott respondents.

of their claims and hosted a banquet to celebrate their safe return. The meeting was called by Don Terry, Manager of McDermott's Diving Division, after he had received several separate inquiries regarding settlement. At the meeting, Don Terry addressed the dive crew and informed them that McDermott would arrange for psychological counseling that any of the crew felt was needed as a result of their experiences during Hurricane Roxanne. During the presentation, Terry informed the men that he had been granted authority by McDermott to discuss the possibility of settlement with any of the divers who had not been physically injured. Terry never threatened any of the divers that a failure to settle would result in their firing. After his presentation, Terry left the divers to meet privately among themselves. The divers selected a spokesman, who proposed their initial settlement demand to Terry. Terry rejected the initial figure as too high, and he suggested that they end talk of settlement and proceed with the banquet.

In the meantime, however, the divers learned from another McDermott spokesman that McDermott's insurance deductible was $1.5 million, and they surmised that McDermott would pay this amount, or $75,000 to each of the McDermott diving related personnel. Shortly thereafter, the crew's spokesman approached J.J. Riddle of McDermott and asked whether McDermott would be willing to pay $75,000 to each member of the twenty-man dive crew. After consulting with Terry, Riddle advised the men that McDermott would be willing to pay $75,000 to each man. After arrangements were made to meet with McDermott's attorneys the following day, the settlement discussions ended.

Later that evening, McDermott hosted the survival celebration for the dive crew as scheduled. The following day, ten members of the dive crew reported to McDermott's office for the express purpose of settling their claims against all of the defendants in this matter. That day, October 28th, six of the petitioners herein met individually with an attorney provided by McDermott at which time a detailed explanation of seaman's rights was given to each. After receiving a full explanation of their rights, including an explanation that a lawsuit could result in substantial awards, these six petitioners settled their claims for $75,000 each.[2] Each meeting was recorded on videotape.

The videotapes establish that each petitioner was advised of his right to independent counsel and his right to bring suit against McDermott, CCC, or any other entity involved in the sinking of the DLB-269. Each petitioner verbally acknowledged his understanding of his physical and emotional condition. Each was advised that he had a right to recover damages for physical and emotional injuries. Moreover, each petitioner clearly was advised that the release encompassed all present or future injuries, whether then known or later discovered. Each petitioner was advised that he was under no obligation to settle and that he should not do so if he had any hesitation or doubt. Each petitioner was given ample opportunity to ask any question about any aspect of his legal rights, the terms of the settlement, or the actual release document.

---

[2] Ordwayne P. Chauvin received $85,000.00 because he also had a minor physical injury.

It is evident from the videotapes that the petitioners were neither intoxicated nor otherwise mentally impaired. To the contrary, the behavior of the petitioners on the videotapes proves that each was coherent, had a complete understanding of what he was doing, and freely entered into the settlement agreement presented to him. Each acknowledged under oath that he, with a full understanding of his legal rights and physical and emotional condition, was voluntarily settling his claim against McDermott, CCC, and all other potential parties. Finally, each received the settlement funds and executed a written receipt and release and a confirming affidavit.

Five of the other petitioners settled their claims in much the same manner, albeit at later dates. Like the first six, each of the five men that settled later was placed under oath and acknowledged a full understanding of his legal rights as well as his physical and emotional condition. Again, each man stated that he had read and understood the settlement agreement and that he was voluntarily settling his claims against McDermott, CCC, and any other potential party. Each settlement was confirmed by a written receipt and release and accompanying affidavit.[3]

The situation with respect to Mr. Carrizales is similar. After being rescued, he returned to his home in Mexico. Later, Mr. Carrizales met with representatives of CCC where he accepted a settlement of his claims. Mr. Carrizales signed

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[3] Ronald Rozmarynowski was a member of the dive crew and a plaintiff below, but he did not agree to settle his claim and did not execute a release. He is not a petitioner in this court.

this settlement and release in court in the presence of a Mexican judge, who approved the settlement in accordance with Mexican civil procedure. This settlement, approved by the court, constitutes a judgment of a foreign court and thus, under the doctrine of comity, must be respected by American courts. Respondents deny the bald allegation that Mr. Carrizales was in any way physically threatened into signing his settlement and release.

In short, all of the petitioners executed valid and binding releases in which they relinquished all claims that they may have had against McDermott, CCC, or any other potential defendants. Consequently, each of the twelve petitioners is barred from bringing claims against the respondents in this action.

**B. Procedural History**

In spite of having signed releases, petitioners filed suit under the Jones Act, 46 U.S.C. §688, in Civil District Court in Orleans Parish, Louisiana. Petitioners chose Louisiana state court and, therefore, chose Louisiana state procedure. Earlier in this case, respondents filed motions for summary judgment on the validity of the releases, which were granted by the trial court. On appeal by the petitioners to the Louisiana Fourth Circuit Court of Appeal, the case was remanded to the trial court for further fact finding on the issue of the validity of the releases. Opinion attached to the Petition as Appendix D, at App. 7; *Coto v. J. Ray McDermott, S.A., et al.*, 772 So.2d 828 (La. App. 4th Cir. 2000).

A jury trial of the main demand was set in April 2002 but continued when, on the eve of trial, petitioners' counsel held a press conference, which clearly was designed to

influence the jury pool. A jury trial of the main demand was set for a second time on September 9, 2002, and was scheduled to last six weeks; however, over a month later only three witnesses had testified. This caused the jury to become antagonistic. When there was a dispute over an alleged comment attributed to an attorney for one of McDermott's excess insurers, the Honorable Marvin F. Gahagan, judge *ad hoc*, granted McDermott's and CCC's motions for mistrial. The Louisiana Fourth Circuit reversed the mistrial, but the Louisiana Supreme Court reinstated the ruling of the trial court by order dated October 18, 2002, No. 2002-CC-2585.

Judge Gahagan then recused himself and, thereafter, the Louisiana Supreme Court appointed the Honorable Gerald Federoff to sit as judge *ad hoc* for the duration of the case. The second trial had been set for six weeks and was running behind even this extended schedule. Given the history of this case and the burden it has put on the trial judges and jurors of the Civil District Court in New Orleans, Judge Federoff suggested that respondents notice their previously filed peremptory exceptions of *res judicata*, for separate evidentiary hearing. This is a procedure provided by La. C.C.P. arts. 927, 929, and 931 and is heard by the judge. In Louisiana procedure, the peremptory exception is a form of gate keeper. A ruling in favor of respondents would avoid a trial of the main demand and save substantial judicial resources and juror time;[4] on the

[4] Granting respondents' peremptory exception of *res judicata* would end this litigation as it concerns 12 of the 13 plaintiffs from the case below. The remaining litigation involving the claim of Ronald Rozmarynowski, who did not sign a release, would take substantially less time than a jury trial of the claims of all 13 plaintiffs.

other hand, a ruling in favor of petitioners would establish that the case merits a full jury trial on the main demand.

After both parties submitted briefs, on January 22, 2003, Judge Federoff entered Reasons and Order setting the exceptions for trial. Reasons and Order attached to the Petition as Appendix C, at App. 5. In the Reasons and Order, Judge Federoff stated unequivocally that the federal substantive maritime law applies to the validity of the seamen's releases, and correctly decided that the state procedural law is applicable when it does not interfere with the substantive maritime law. Finding no substantive interference, he ordered that the respondents' exception of *res judicata* be heard by the court without a jury.

Immediately thereafter, petitioners sought writs from the Louisiana Fourth Circuit, and, on April 22, 2003, the Louisiana Fourth Circuit upheld Judge Federoff's order setting the exceptions for trial. Opinion attached to the Petition as Appendix C, at App. 1. Petitioners then sought writs from the Louisiana Supreme Court, which were denied on September 26, 2003. Order attached to the Petition as Appendix B, at App. 3. Subsequently, petitioners have filed their petition for writ of certiorari to the Louisiana Fourth Circuit Court of Appeals with this Court.

## REASONS FOR DENYING THE PETITION

The trial court, affirmed by the Louisiana Fourth Circuit Court of Appeals, correctly held that, when a seaman elects to bring his action under the Jones Act, 46 U.S.C. §688, in state court, the determination as to the validity of a seaman's release is subject to state rules of procedure.

Under the Louisiana Code of Civil Procedure, when a plaintiff has executed a valid release, his cause of action may be dismissed on an peremptory exception of *res judicata*. La. C.C.P. art. 927. This exception is tried to the court, without a jury, and before the main demand. La. C.C.P. arts. 929, 931. The exception is a gate keeping device and is consistent with the seaman's right to jury trial on the main demand. *Shell Oil Company v. Kennedy,* 344 So.2d 1153 (La. App. 4th Cir. 1977).

Trial of the exceptions also is consistent with the Savings to Suitors Clause, 28 U.S.C. §1333(1), and the Jones Act, 28 U.S.C. §688, because this Court traditionally has granted the states wide latitude in applying their *procedural* rules to maritime cases in state court and because the trial of the exceptions does not prejudice the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law. *American Dredging Co. v. Miller*, 510 U.S. 443 (1994).

Further, the FELA, 45 U.S.C. §51, *et seq.*, cases cited by petitioners are distinguishable because the Jones Act only incorporates the *statutory* provisions of FELA, and FELA has no *statutory* provision for jury trial. Moreover, the Texas litigation cited by petitioners is based on entirely different causes of action and the procedural rules of another state, and therefore, is distinguishable.

## I. Louisiana Uses the Exception of *Res Judicata* as a Screening Mechanism to Determine Whether the Case Should Proceed to Jury Trial on the Main Demand

Peremptory exceptions are procedural devices which allow the district court to adjudicate certain, discrete

issues before trial, including prescription, non-joinder of parties, no cause of action, no right of action, and *res judicata*. La. C.C.P. art. 927. Peremptory exceptions may be tried prior to trial, by the court, sitting without a jury, and the court may hear evidence and make factual determinations. La. C.C.P. art. 929, 931. Each peremptory exception is a complete bar to recovery. Therefore, when the court grants a peremptory exception, the court saves the judicial resources used in a full trial on the main demand.

It is well settled under Louisiana law that the proper procedural mechanism for asserting the defense of compromise or release is the peremptory exception of *res judicata*. *Brown v. Drillers, Inc.*, 630 So.2d 741, 747 (La. 1994); *Rivett v. State Farm Fire and Cas. Co.*, 508 So.2d 1356 (La. 1987); *Murphy v. Hoffpauir*, 540 So.2d 473 (La. App. 2d Cir. 1989). The peremptory exception of *res judicata* has been used to determine the validity of seamen's releases. *See, e.g., LeBlanc v. Callais Enterp. Part., Inc.*, 767 So.2d 823 (La. App. 5th Cir. 2000). A trial judge may determine, in advance of a jury trial on the merits, a peremptory exception of *res judicata,* even when factual evidence must be evaluated to make the determination. *Shell Oil Company v. Kennedy,* 344 So.2d 1153, 1154 (La. App. 4th Cir. 1977), *citing Babineaux v. Pernie-Bailey Drilling Co.,* 261 La. 1080, 262 So.2d 328 (La. 1977).

Petitioners argue that the trial court's hearing of the exceptions of *res judicata* would deny them the right to trial by jury afforded by the Jones Act. Notably, Louisiana has held that a judge trial of an exception of compromise does not deny plaintiff of his right to trial by jury on the main demand. *Shell Oil Company v. Kennedy,* 344 So.2d 1153 (La. App. 4th Cir. 1977); *citing Babineaux v. Pernie-Bailey*

*Drilling Co.*, 262 So.2d 328 (La. 1978); *Bowden v. State Farm Mut. Auto. Ins. Co.*, 150 So.2d 655 (La. App. 3rd Cir. 1963). Indeed, in *Shell*, the Fourth Circuit rejected the plaintiff's argument that factual issues as to the validity of a compromise were jury questions, concluding that "a plaintiff is not denied the right of trial by jury because [Louisiana's] procedural system requires or permits certain issues to be decided by the judge alone in advance of the trial." *Shell Oil*, 344 So.2d 1153 at 1154. Rather, the Court noted that Louisiana procedure "[utilizes] such devices as the peremptory exception to avoid the full-scale trial of actions which may be finally determined by the trial in advance of a conveniently separable issue." *Id.* If the exception is denied, the main demand is tried to the jury.

## II. Louisiana's Use of the Exception of *Res Judicata* is Consistent with Federal Maritime Law

Although the original petition was filed in Louisiana state court, there is no dispute that the substantive federal maritime law applies to the validity of these releases. Reasons and Order of the District Court, attached to the Petition, Appendix C, App. at 5; *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). However, the exception of *res judicata* is a procedural device, and procedure is determined by state law.

As this Court has stated, a matter is procedural when it "does not bear upon the substantive right to recover, and is not a rule upon which maritime actors rely in making decisions about primary conduct – how to manage their business and what precautions to take." *American Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994). A seaman

would have the same right to recover under the Jones Act regardless of whether a judge or jury determines the validity of his release; likewise, a defendant maritime employer would manage its business in the same fashion regardless of whether a judge or jury decided the validity of a release. Therefore, a trial court's decision to hear an exception of *res judicata* on a seaman's release is a procedural and not a substantive matter.

Extensive case law of this Court holds that, when it does not conflict with substantive maritime law, state courts may apply state procedures in adjudicating maritime actions under the "Saving to Suitors" clause. *See American Dredging Co. v. Miller*, 510 U.S. 443 (1994), *Madruga v. Superior Court of Calif.*, 346 U.S. 556 (1954), *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109 (1924). This Court held that, while a state may not provide for an *in rem* action in state court, "the State, having concurrent jurisdiction [under the "Saving to Suitors" clause], is free to adopt such remedies, and to attach to them such incidents, as it sees fit." *Red Cross Line*, 264 U.S., at 124 (holding that New York's Arbitration Law may be used to compel parties in an admiralty action). State procedure is to be applied in state courts unless it "works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Miller*, 510 U.S., at 447 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917) (upholding Louisiana's rejection of the doctrine of *forum non conveniens*).

States are given relatively wide scope in terms of what is permissible state action in admiralty jurisdiction:

> Wherever the boundaries of permissible state regulation may lie, they do not invalidate state rejection of *forum non conveniens*, which is in two respects quite dissimilar from any other matter that our opinions have held to be governed by federal admiralty law: it is procedural rather than substantive, and it is most unlikely to produce uniform results.

*Miller*, 510 U.S., at 453. Thus, where a matter is procedural or does not necessarily require uniformity in application, state laws will apply.[5]

The exception of *res judicata* is exactly the type of proceeding that this Court has approved of in *Miller*. Petitioners have chosen to bring their case in state court; while substantive maritime law applies, this case is subject to state procedure, including the exceptions created under the Louisiana Code of Civil Procedure. Further, the use of the peremptory exception will not "work material prejudice to the characteristic features of the general maritime law" because the trial court will be bound by the

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[5] This is consistent with the general rule of conflicts that whether an issue is decided by the judge or a jury is determined by the law of the forum. *Restatement, Conflict of Laws* (Rev. 1988) §129; *Ettelson et al. v. Metropolitan Life Ins. Co.*, 137 F.2d 62, 64 (3rd Cir. 1943), *cert. denied*, 320 U.S. 777.

For example, in a diversity case in federal court, substantive questions are governed by state law, but which issues go to the jury is determined by federal law. *Simler v. Conner*, 372 U.S. 221, 222, 9 L. Ed. 2d 691, 83 S. Ct. 609 (1963) (whether the propriety of a lawyer's fee was an equitable issue for the judge or a legal issue for the jury was determined by federal standards); *Adams v. Johns-Manville Corp.*, 876 F.2d 702, 709 (9th Cir. 1989) (whether an issue of prior settlement goes to the jury or the judge decided based on federal standards of what is equity and what is law).

same legal standards under the Jones Act as a jury would be. The court will follow the federal substantive rules regarding the burden of proof and standard for determining whether a seaman's release is valid. *See* Reasons and Order of the District Court attached to the Petition as Appendix C, at App. 5; *Garrett v. Moore-McCormack Co. supra.* The applicants will have the opportunity to present all of their evidence regarding alleged fraud or coercion to the court, and the trial judge will apply federal maritime law to the issue of the plaintiffs' releases. Such a trial of the exception of *res judicata* would affect the plaintiffs' claims no more than a dismissal for *forum non conveniens* and, by the standards established by *American Dredging Co.*, trial of the exception preserves the characteristic features of maritime law and maintains its harmony and uniformity.[6]

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[6] Several decisions of Louisiana state courts also support this conclusion.

In *Milstead v. Diamond M Offshore, Inc.*, 676 So.2d 89 (La. 1996), the Louisiana Supreme Court noted that, even prior to *Miller,* it had held that the application of state procedural remedies in both general maritime cases and Jones Act cases. *See id.* at 94-95 (*citing Daigle v. Coastal Marine, Inc.*, 488 So.2d 679 (La. 1986)). *Milstead* involved a question of whether a Louisiana appellate court should use a Louisiana or federal standard in reviewing a Jones Act judge trial. The Louisiana Supreme Court held that the standard of appellate review is procedural and that use of the state standard did not prejudice the harmony or uniformity of maritime law. Moreover, in *Milstead,* the Louisiana Supreme Court extended the holding of *Daigle, supra,* and suggested that Louisiana courts of appeal should apply the state, rather than federal, standard of review in both general maritime and Jones Act jury trials. *Milstead,* 676 So.2d at 95. In so deciding, the Louisiana Supreme Court focused on two primary factors: first, that standards of review are procedural in nature; and, second, that standards of review are not characteristic features of general maritime law such that application of

(Continued on following page)

## III. Rules for Jury Trials Made by Judges in FELA Cases Are Not Incorporated in the Jones Act

Petitioners have based their argument that a jury must decide the exception of *res judicata* squarely on decisions interpreting the Federal Employer's Liability Act ("FELA"), 45 U.S.C. §51, *et seq*. Petition at 8. Petitioners argue that the Jones Act, 46 U.S.C. §688, incorporates all provisions of FELA, including its judicial gloss. However, the Jones Act incorporates "all *statutes* of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees[.]" 46 U.S.C. §688. (emphasis added) Accordingly, the incorporation of FELA into the Jones Act is limited to the *statutory* provisions of FELA such as the abolition of contributory negligence and assumption of risk, and the gloss on those express statutory provisions. In contrast,

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Louisiana's standards of appellate review would interfere with the proper harmony and uniformity of general maritime law. *Id.*

More recently, the Louisiana Third Circuit Court of Appeal relied upon *Milstead* for the proposition that, while federal law is applicable to substantive issues in unseaworthiness and Jones Act cases, Louisiana appellate courts are correct to conduct their reviews under the applicable state law standard of review, manifest error. *Aycock v. Ensco Offshore Co.*, 833 So.2d 1246 (La. App. 3d Cir. 12/18/02).

Indeed, the application by Louisiana courts of the state standard of review in Jones Act cases was formerly even more significant, as Louisiana law provided for appellate review of fact as well as law. La. Const. art. 7, §§10, 29 (1921). To the contrary, under federal law appellate courts may not disturb the finding of a jury on the merits unless there appears to be no reasonable basis for the jury's finding. *Gallic v. Baltimore & Ohio R.R.*, 372 U.S. 108 (1963). Thus, the Louisiana standard controlled in spite of the fact that it differed considerably from the federal standard.

the right to jury trial in FELA cases in state court is *judge made* and, therefore, not incorporated into the Jones Act.

FELA contains no provision granting a right to a trial by jury. 45 U.S.C. §51, *et seq*. Instead, the right to a trial by jury in FELA cases in state court is entirely a judicial creation. In *Bailey v. Central Vermont R. Co.*, 319 U.S. 350 (1942), a FELA case, the issue was whether plaintiff had presented sufficient proof of negligence for the jury to find in his favor. The Supreme Court of Vermont held that the defendant/respondent was entitled to a directed verdict. *Id.*, at 350. This Court reversed that holding, finding that there was sufficient evidence to support the verdict, and stated that "To withdraw such a question from the jury is to usurp its functions." *Id.*, at 354. In explaining the decision, the Court quoted an earlier holding that "The right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." *Jacob v. New York*, 315 U.S. 752, 752 (1941) (reversing Federal District Court's dismissal of Jones Act complaint).

Later, in *Dice v. Akron, Canton & Y. R. Co.*, 342 U.S. 359 (1952), a FELA case from the Supreme Court of Ohio, the issue was not just whether a directed verdict was proper in the particular circumstances of the case, but to whom a question of settlement would be submitted in the first instance: the judge or the jury. This Court quoted *Bailey* that trial by jury was "part and parcel of the remedy afforded railroad worker under the Employer's Liability Act." *Id.*, at 363 (quoting *Bailey*, 319 U.S., at 354). Thus, *Dice* extended *Bailey* to create a new rule for jury

trials in FELA cases in state court.[7] The basis of *Dice* can only be a judicially created right peculiar to the circumstances of railroad workers and FELA. It clearly is not based on any statutory provision of FELA or an interpretation of any such statutory provision of FELA, and, accordingly, the rule of *Dice* is not incorporated into the Jones Act.

In contrast, the cases cited by petitioners holding that FELA jurisprudence is incorporated into the Jones Act deal exclusively with issues of *liability* explicitly addressed in *statutory* provisions of FELA. *Kernan v. American Dredging Co.*, 355 U.S. 426, 432-33 (1958) (Jones Act incorporates case law on FELA provision, 45 U.S.C. §54, holding employer negligent due to statutory violation); *Cox v. Roth*, 348 U.S. 207, 209 (1955) (interpreting FELA provision, 45 U.S.C. §57, allowing for suits against receivers as allowing a Jones Act suit against the survivor of a tortfeasor); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990) (seaman's cause of action under Jones Act survives to his personal representative by incorporating FELA provision 45 U.S.C. §59); *Engel v. Davenport*, 271 U.S. 33, 38-39 (1926) (incorporating FELA's two year statute of limitations into Jones Act, from former §6 of FELA); *Hopson v. Texaco, Inc.*, 383 U.S. 262, 263-64 (1966) (Jones Act incorporates FELA case law on definition of "agent" as used in 45 U.S.C. §51); *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 324 (1927) (§1 of FELA was incorporated into the

[7] The *Dice* decision has been criticized by several state courts hearing FELA cases. *See, e.g., Ex parte: Burlington Northern R. Co.*, 470 So.2d 1094, 1097 (Ala. 1985).

Jones Act and supplanted the rule from *The Osceola*, 189 U.S. 158 (1903)).[8]

Indeed, FELA and the Jones Act differ substantially on other non-statutory issues. The issue of releases under the Jones Act and FELA is particularly pertinent here. A FELA railroad worker attacking the validity of his release bears the burden of proving the release to be invalid. *Callen v. Penn. R. Co.*, 332 U.S. 625 (1948). In *Callen*, this Court held that "until the Congress changes the statutory plan, the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted." *Id.*, at 630. In this specific area where there are no statutory provisions of FELA, Jones Act jurisprudence from this Court has established a substantially different legal standard. Under the Jones Act, the party seeking to enforce a seaman's release bears the

[8] The only case cited by petitioners addressing an issue not specifically included in the statutory language of FELA is *Miller*, although the reference to FELA is dicta. This Court, having already determined that Louisiana's rejection of *forum non conveniens* was not in conflict with general maritime law, also noted that the same result had been reached under FELA. *Miller*, 510 U.S., at 456. This Court cited *Missouri ex rel. Southern R. Co. v. Mayfield*, 340 U.S. 1, 5 (1950), which itself simply held that there was nothing in FELA that would compel a state to reject its own doctrine of *forum non conveniens*. Thus, both *Mayfield* and *Miller* simply found that there were no provisions in either FELA or the Jones Act that would affect a state's doctrine of *forum non conveniens*; this is hardly an importation of a judicial gloss regarding a non-statutory issue.

burden of proof in asserting the validity of a release. *Garrett v. Moore-McCormack*, 317 U.S. 239, 248 (1942).

It is clear from the jurisprudence of this Court that, when FELA is silent on a particular point, there may be variation between the legal standards applied to FELA and Jones Act cases. Therefore, the Jones Act only incorporates statutory provisions of FELA and FELA jurisprudence on non-statutory issues is not controlling in Jones Act cases. Accordingly, *Dice* is not controlling in this case.

## IV. The Texas Litigation Arising from the Capsize of the DLB-269 is Distinguishable Because the Causes of Action and State Procedures Are Different

The decisions of the Texas courts to which petitioners refer, Petition at 12, are distinguishable. 46 U.S.C. §688(b) bars foreign oil field workers on the outer-continental shelf of foreign countries from bringing claims under the Jones Act, the General Maritime Law, or state law. Section 688(b) applies to the plaintiffs in the Texas proceedings, and, accordingly, they have brought their claims under Mexican law. *Stier v. Reading & Bates Corp., et al.*, 992 S.W.2d 423 (Tex. 1999). Therefore, the Jones Act is not involved, and the two cases are distinguishable.

Further, the trials conducted in Texas were on the plaintiffs' main demands, not an exception of *res judicata*. In addition, there is the obvious difference that the Texas cases are brought in Texas state court and are subject to Texas procedural rules. If Texas chooses to grant a jury trial to the plaintiffs there, it can have no effect on petitioners who chose to bring their cases in Louisiana state court.

## V. Petitioners Raise a Narrow Issue Which Affects Them Only

Petitioners base their request for a writ of certiorari on an alleged conflict between a state procedure for determining the validity of a release and this Court's 1952 decision in *Dice*. Yet, petitioners cite no case in which such a conflict has arisen in the 52 years since *Dice* was decided. It, therefore, is obvious that the issue raised by petitioners is important to them only and that it lacks any of the factors necessary to be worthy of a writ of certiorari from this court. U.S.S.C. Rule 10.

## CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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February 3, 2004

(3)

No. 03-939

Supreme Court, U.S.
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# In The
# Supreme Court of the United States

VICTOR DIAZ, ET AL.,
[FORMERLY ODILON CHACHO COTO, ET AL.],

*Petitioners,*

v.

J. RAY McDERMOTT, S.A., ET AL.,

*Respondents.*

**On Petition For A Writ Of Certiorari To The Court Of Appeal For The Fourth Circuit Of The State Of Louisiana**

## RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Petitioners, allegedly injured seamen, brought an action in a Louisiana state court pursuant to the "saving to suitors clause" seeking damages under the Jones Act and the general maritime law. Respondents contend that prior to bringing suit, Petitioners freely and voluntarily settled their claims and executed releases with a full understanding of their legal rights. Under Louisiana law, an exception of *res judicata* is the proper procedural device for determining the validity of a release and may be heard by the court in advance of trial. Respondents filed exceptions of *res judicata* which were set for hearing by the trial judge who held that substantive maritime law would be applied to determine the validity of the releases.

Petitioners were denied supervisory writs by the Louisiana Fourth Circuit Court of Appeal and by the Louisiana Supreme Court. Therefore, the questions presented for review are (1) whether Petitioners have properly invoked the *certiorari* jurisdiction of this Court, and (2) whether Louisiana procedural law applies to this Jones Act and general maritime law action filed in a Louisiana court under the saving to suitors clause.

## CERTIFICATE OF INTERESTED PARTIES

The Petitioners do not accurately list the parties to the proceeding. While the caption lists McDermott Underwater Services, Inc. as a respondent, there is no such entity. The named defendants in the court below include, but are not limited to, McDermott International, Inc., McDermott Inc., J. Ray McDermott, S.A., J. Ray McDermott, Inc., Offshore Petroleum Divers, Inc. and Insurance Company of North America, Inc. (hereinafter McDermott Respondents).

In compliance with Rule 29.6, Respondents offer the following:

McDermott International, Inc. has no parent company. The following are non wholly-owned subsidiaries of McDermott International, Inc.: P.T. Babcock & Wilcox Indonesia; MacShelf Ltd.; J. Ray McDermott, S.A.

McDermott Inc.'s parent company is McDermott International, Inc. McDermott Inc. does not have any non wholly-owned subsidiaries.

J. Ray McDermott, S.A.'s parent company is McDermott International, Inc. J. Ray McDermott, S.A. has the following non wholly-owned subsidiaries: McDermott Servicos de Construcao, Ltda.; P. T. Bataves Fabricators; Malmac Sdn. Bhd.; McDermott Abu Dhabi Offshore Construction Company; McDermott Arabia Company Limited; Initec, Astano y McDermott International Inc., S.A.

J. Ray McDermott, Inc. (formerly OPI International, Inc.) has J. Ray McDermott Holdings, Inc. as its parent company. J. Ray McDermott, Inc. has the following non wholly-owned subsidiaries: WD 140 Platform LLC; TL Marine Sdn. Bhd.

## CERTIFICATE OF INTERESTED PARTIES – Continued

Offshore Petroleum Divers, Inc.'s parent company is J. Ray McDermott, Inc. Offshore Petroleum Divers, Inc. does not have any wholly-owned subsidiaries and was dissolved on August 21, 1998.

Insurance Company of North America, Inc. was the primary insurer of J. Ray McDermott, Inc.

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## JURISDICTION

The McDermott Respondents contest Petitioners' assertion of jurisdiction pursuant to 28 U.S.C. § 1257(a). Petitioners concede that they seek review of a state trial court procedural decision which does not constitute a final judgment or decree rendered by the highest court of the state in which a decision could be had. (Petitioners' Brief at p. 7, n. 4). Petitioners seek to expand this Court's "pragmatic approach" to jurisdiction but fail to recognize that such an approach is not meant to "swallow the rule" of finality and is strictly reserved for most extraordinary circumstances where important constitutional or federal policy is being eroded. R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 3.5 at 146 (8th ed. 2002), citing *Flynt v. Ohio*, 451 U.S. 619 (1981).

Contrary to Petitioners' assertion, this Court's decision in *American Dredging Co. v. Miller*, 510 U.S. 443, 447 (1994), is not pertinent to the issue of jurisdiction presented here. In *Miller*, the Louisiana trial court dismissed the plaintiff's suit under the federal maritime law doctrine of *forum non conveniens*; Miller appealed as of right to the Louisiana Fourth Circuit which affirmed. The Louisiana Supreme Court, the highest court of that state, reversed and held that Louisiana's procedural limitations on the doctrine of *forum non conveniens* in Jones Act and general maritime law cases was not preempted by substantive maritime law. The Louisiana Supreme Court conclusively decided the issue of *forum non conveniens* and its judgment on that federal maritime law issue was deemed final notwithstanding its remand of the case for trial. *Cox Broadcasting Corporation v. Cohen*, 420 U.S. 469, 477 (1975); *see also*, R. STERN, E. GRESSMAN, S. SHAPIRO & K. GELLER, SUPREME COURT PRACTICE § 3.7 at

150-57 (8th ed. 2002). In the present case, Petitioners were merely denied supervisory writs by the Louisiana Fourth Circuit Court of Appeal and by the Louisiana Supreme Court; there is simply no final judgment or decree to satisfy the *certiorari* jurisdiction requirements of 28 U.S.C. § 1257(a).

## STATEMENT OF THE CASE

### Statement of Facts

This litigation arises out of the sinking of the DLB-269 in the Bay of Campeche off the coast of Mexico on October 15, 1995. The DLB-269 was owned and operated by CCC,[1] a Mexican corporation which performed offshore oil field services for Pemex, the Mexican national oil company. Eleven of the twelve Petitioners in this litigation were employed by J. Ray McDermott Inc. as dive crew members aboard the DLB-269. The twelfth Petitioner, Cortes, is a Mexican national who was aboard the vessel as a pipeline welder employed by CCC through CIC,[2] a Mexican labor supply company.

While J. Ray McDermott Inc. held a minority stock interest in CCC, McDermott's only involvement with the DLB-269 was its contract with CCC to provide divers and diving support personnel (twenty in number) to the DLB-269 through its division known as McDermott Underwater

[1] Respondent CCC Fabricaciones y Construcciones, S.A. de C.V.

[2] Respondent Corporacion de Industrias Construcciones, S.A. de C.V.

Services. The McDermott diving contingent aboard the vessel performed diving operations in support of the vessel's pipe laying activities. CCC's barge captain and barge superintendent were responsible for the navigation and operation of the vessel. The crew of the DLB-269 totalled approximately 250, most of whom were Mexican nationals employed by CCC through CIC.

During the period in question, the DLB-269 was towed by the M/V CAPTAIN JOHN and the M/V NORTH CAROLINA which served as towing and assist vessels directed by CCC's barge captain and barge superintendent pursuant to a charter between Northbank Towing, Inc. and CCC. Because of adverse weather from Hurricane Opal, the DLB-269, under the direction of CCC's barge captain (Cantu) and barge superintendent (Lobb), picked up anchors and towed away from the field to ride out the storm as was CCC's customary and usual procedure. The decisions of Cantu and Lobb were approved by Joe Perot, CCC's shoreside operations manager. After the pass of Hurricane Opal without incident to the barge or its crew, the DLB-269 returned to the Bay of Campeche and resumed oil field operations on October 6, 1995.

By October 9th tropical storm Roxanne was in the process of moving from the northwest Caribbean toward the southern Gulf of Mexico. On October 10th the DLB-269 picked up anchors to get under tow due to the approach of Hurricane Roxanne. Again, this decision was made by the barge captain Cantu and the superintendent Lobb and was discussed with Perot, CCC's shoreside operations manager. When Roxanne crossed the Yucatan Peninsula into the Bay of Campeche, it was downgraded to a tropical storm, passed near the barge on October 12th and continued its track toward the west. The DLB-269

remained under tow and weather conditions improved on the 13th. On October 14th a cold front was forecast to move southeast across the northern Gulf of Mexico; it was forecasted that the storm would strengthen to hurricane force but dissipate rapidly and weaken the following day.

Rather than dissipate, Hurricane Roxanne made a 180 degree turn toward the direction of the DLB-269 which remained under tow. On October 15th the vessel encountered heavy winds and high seas; the tow lines parted, and the barge anchors were dropped in an attempt to hold the bow into the seas but the vessel began to sink by the stern. In the late afternoon, life rafts were launched and the barge crew abandoned ship with the M/V CAPTAIN JOHN, the M/V NORTH CAROLINA and a third vessel, the M/V DUCKER TIDE, standing by.

Petitioners, as well as other crew members, were picked up by the assist vessels[3] and were taken into the port of Ciudad del Carmen where they showered, changed clothes and called home. After a brief stay in Mexico, each McDermott employee was provided travel expenses and was flown back to the United States where each returned to his respective home. Don Terry, Manager of McDermott's Diving Division, scheduled a meeting and banquet for the dive crew to be held at the Hyatt Regency in New Orleans on October 27th, twelve days after the sinking and after Petitioners had an opportunity to visit with family and friends. Terry had received word that some

[3] Contrary to the misleading assertion at page 3 of Petitioners' Brief, the McDermott Petitioners were picked up within one-to-four hours of abandoning ship; none sustained serious physical injury.

members of the dive crew had inquired about monetary compensation for their experience during Hurricane Roxanne and that others had been contacted by representatives of plaintiff attorneys. Because it was inevitable that the subject of settlement would be raised during the Hyatt meeting, Terry decided to initiate settlement discussions.

Terry addressed the dive crew at a noon meeting at the Hyatt on October 27th and first offered counseling or psychological assistance to any member of the dive crew who had psychological problems or concerns as a result of his experience in abandoning ship during Hurricane Roxanne. Terry instructed that anyone having psychological concerns should consult privately with J. J. Riddle, McDermott's Diving Safety Officer and Claims Manager who was present at the meeting.[4] Terry advised that he had authority from McDermott, without the necessity of involving its underwriters, to discuss settlement with any member of the dive crew who had not sustained physical injury. Terry stressed that no one was under any pressure to settle his claim.

At the conclusion of Terry's initial remarks, the dive crew was left alone to appoint a spokesman and determine whether they could arrive at a settlement figure acceptable to the members of the crew. The dive crew discussed

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[4] McDermott diver, Kris Nielsen, advised Terry of ongoing psychological problems and was not allowed to participate in settlement negotiations. Nielsen commenced psychiatric treatment and had not returned to gainful employment when his non-jury trial was held in March of 1998. Petitioners' reference to the *Nielsen* decision, page 4, n.1 of Petitioners' Brief, is of no consequence to the issue raised herein.

settlement figures and appointed diving supervisor and petitioner, Chuck Rountree, as their spokesman who submitted their settlement demand, $500,000 per man, which was unacceptable to Terry and McDermott. Terry told the crew to proceed with the banquet without further discussing settlement. At the conclusion of the meeting, petitioner Noble obtained information from Riddle that McDermott's deductible was $1.5 million. Noble and other members of the dive crew divided the deductible by twenty, the number of the dive crew, and concluded that McDermott would probably settle for $75,000 per man. Shortly after the meeting, Rountree approached Riddle and asked whether McDermott would pay $75,000 in settlement as he and other crew members would settle for that amount. After discussions with Terry, Riddle advised Rountree that McDermott would in fact pay $75,000 to those interested. Rountree reported that at least half of the dive crew would accept that settlement and arrangements were made to meet the following day with the McDermott attorneys to execute releases.

Later that evening, the banquet was held at the Hyatt as scheduled; food and alcoholic beverages were provided and a good time was had by the attendees. The following day, ten members of the dive crew appeared at McDermott's office for the purpose of settling their claims. Cline, Rountree, Diaz, Harris, Pheffer and Boettger, six of the Petitioners herein, settled on October 28th, the day after the banquet. Before executing a receipt and release, each was individually interviewed by legal counsel arranged through McDermott who provided a detailed and thorough explanation of each seaman's rights. The individual settlement interviews with Cline, Rountree, Diaz, Harris, Pheffer and Boettger were videotaped with their

consent. Harris, Pheffer and Boettger had been medically cleared and immediately returned to work while Cline and Rountree elected to take some weeks off before returning to work. Diaz was medically cleared to return to work but did not do so.

The video tapes establish that each petitioner was advised of his right to independent counsel and his right to bring suit against McDermott or any other entity involved in the sinking of the DLB-269. Each Petitioner acknowledged his understanding of his physical and emotional condition and each was advised of his right to recover damages for physical and emotional injuries. Each Petitioner was further advised that the release encompassed all injuries whether then known or later discovered. Each Petitioner was advised that he was under no obligation to settle and that he should not do so if he had any hesitation or doubt. Each Petitioner was encouraged to ask any question about any aspect of his legal rights, the terms of the settlement or the release document.

The video tapes confirm that each individual Petitioner was neither intoxicated nor otherwise mentally impaired. The video tapes further show that these six Petitioners were alert, coherent and perceptive. Their answers to questions directed to them were responsive and appropriate; their speech was articulate and their words were plainly enunciated. Each was placed under oath and acknowledged that he had a full understanding of his legal rights and his physical and emotional condition, that he had read and understood the release and that he was voluntarily settling his claim against all potential parties. Each executed a receipt and release and a confirming affidavit.

The other five Petitioners settled at later dates: Richins (10/30/95), Richard (11/2/95), Horschel (11/23/95), Noble (12/19/95) and Chauvin (1/30/96).[5] Again, each of the five was placed under oath and acknowledged that he had a full understanding of his legal rights as well as his physical and emotional condition, that he had read and understood the release and that he was voluntarily settling his claim against all potential parties. Each of the five executed a receipt and release and confirming affidavit and the release session was videotaped. Horschel, Noble and Chauvin each settled after having returned to work at their very same job.

**Actions of the Trial and Appellate Courts**

This suit was originally filed on behalf of Mexican nationals; twelve members of the McDermott dive crew were added as plaintiffs by supplemental and amending petitions. The McDermott defendants answered plaintiffs' suit and asserted the affirmative defense of compromise. The trial court granted McDermott's initial exception of no right of action and dismissed the Jones Act and general maritime law claims of the Mexican nationals with prejudice pursuant to Section (b) of the Jones Act, 46 U.S.C. § 688(b). Notwithstanding their request for trial by jury, the trial court made evidentiary findings in maintaining McDermott's procedural exception of no right of action. La.Code Civ. Proc. art. 931. The Louisiana Fourth Circuit Court of Appeal affirmed the dismissal of the claims of the

[5] Chauvin was not allowed to settle during the Hyatt meeting because he had a minor hip injury. Chauvin later settled for $85,000 after having been fully discharged from medical treatment.

Mexican nationals through the exception of no right of action. *Coto v. J. Ray McDermott, et al.*, 96-2701 (La. App. 4 Cir., 3/18/98), 709 So. 2d 1023. Writs on behalf of the Mexican nationals to both the Louisiana Supreme Court and the United States Supreme Court were denied. *Coto v. J. Ray McDermott, et al.*, 98-1443 (La. 10/16/98), 726 So. 2d 904; 526 U.S. 1050 (1999). There was never any question that the dismissal of the Jones Act and general maritime law claims with prejudice on the exception of no right of action deprived the Mexican nationals[6] of any right to trial by jury.

The remainder of the case, the claims of the Petitioners herein, then proceeded through discovery. The trial court granted summary judgment to the McDermott defendants and to the other defendants upholding the releases executed by the eleven McDermott Petitioners. The trial court found that the Petitioners were not improperly influenced or coerced by any of the events which preceded the signing of the releases during the videotaped sessions and that the Petitioners understood that their injuries may be or grow worse than they seemed to be. The trial judge further concluded that the Petitioners executed their releases with a full understanding of their legal rights and medical condition all in accordance with the maritime law established in *Garrett v. Moore-McCormack*, 317 U.S. 239, 248 (1942). Petitioners appealed that decision

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[6] These are the very same Mexican nationals who later filed suit in the Texas state court seeking recovery under Mexican law; their Texas state court suit is not based on the Jones Act or the U.S. general maritime law, a significant distinguishing factor not mentioned by Petitioners in reference to that case at pp. 5 and 7 of their Brief.

to the Fourth Circuit; a five judge panel held "the summary judgments rendered herein are reversed and set aside and the case is remanded to the trial court for further proceedings." *Coto v. J. Ray McDermott, S.A.*, 772 So. 2d 828 (La. App. 4 Cir. 2000) (McKay, J. dissenting and concluding " . . . defendants' summary judgment evidence satisfied the burden of establishing that each seaman freely and voluntarily executed his **release** with a full understanding of all his rights and as well as the consequences of the releases.") 772 So. 2d at 831-32.

When trial began on April 15, 2002, a continuance was required because of a press conference held by John O'Quinn, Petitioners' Texas counsel, which was broadcast that evening on television and the next morning by the print media, all in violation of Louisiana Supreme Court Rule 3.6, Trial Publicity, and to the substantial prejudice of defendants during jury selection. On September 9, 2002, the second trial of this matter began but a mistrial was granted on October 10th. While the mistrial was set aside by the Louisiana Fourth Circuit, the mistrial was reinstated by the Louisiana Supreme Court which noted that past and present prejudicial misconduct prevented Respondents from receiving a fair and impartial trial.

A status conference was held by the trial judge on December 16, 2002 for the purpose of selecting a trial date; the court queried counsel as to whether the seamen's releases could properly be determined by an exception of *res judicata* in advance of trial. The trial judge requested all parties file memoranda on the issue by January 14, 2003 and set a hearing on January 21st to determine whether the court would proceed with the exception of *res judicata* on February 10th. On January 14th, McDermott Respondents filed a memorandum citing authority that

the seamen's releases could properly be determined by an exception of *res judicata*. McDermott Respondents also filed separate Exceptions of *Res Judicata* as to the McDermott Petitioners on January 16th.

At the hearing of January 21st, the trial judge concluded that federal substantive maritime law applied to the validity of a seaman's release while state procedural law applied to a Jones Act case brought in state court. The trial judge held that the Louisiana Code of Civil Procedure article 929 provided that issues of releases could be tried by the court in advance of the trial through the exception of *res judicata*. The trial court exercised its discretion and set a bench hearing on the exceptions of *res judicata* for February 10, 2003. (Pet. App. 5, Appendix C).

Petitioners obtained a stay of the February 10th hearing and filed an Application to the Louisiana Fourth Circuit Court of Appeal for Supervisory Writ seeking reversal of the trial court's decision. On April 22nd, the Louisiana Fourth Circuit Court of Appeal denied writs noting that "the trial court properly exercised its discretion in setting defendants' exceptions of *res judicata* for separate, bench trial. See La.C.C.P. art. 929." (Pet. App. 1, Appendix A). On May 20, 2003 Petitioners filed an Application for Supervisory Writ to the Louisiana Supreme Court which denied the Writ Application on September 26, 2003. (Pet. App. 3, Appendix B).

## REASONS FOR DENYING THE WRIT

### Rule 10(b) Considerations

The McDermott Respondents respectfully submit that Petitioners' Writ of *Certiorari* does not warrant review under considerations of Rule 10(b) of the Rules of the Supreme Court. Petitioners initially assert that the procedural decision of the Louisiana trial court results in less favorable treatment to the Petitioners on an important issue than treatment afforded by a Texas state trial court to other seamen injured in the same incident. Neither the Louisiana trial court nor the Texas trial court are state courts of last resort as specified in Rule 10(b). Nevertheless, Petitioners further pursue the same argument at page 12 of their Brief and contend that the Petitioners herein are similarly situated to the plaintiffs in the Texas litigation. Petitioners' argument lacks candor.

The plaintiffs in the Texas state court litigation are the same Mexican nationals who were once plaintiffs in the Louisiana proceeding which is the subject of this Writ. The Jones Act and general maritime law claims of those Mexican nationals were dismissed with prejudice by the Louisiana trial court pursuant to Section 688(b) of the Jones Act.[7] That dismissal was affirmed by the Louisiana appellate court, *Coto v. J. Ray McDermott, et al.*, 96-2701 (La. App. 4 Cir., 3/18/98), 709 So. 2d 1023, and writs were denied by the Louisiana Supreme Court and by this Court.

[7] The Louisiana courts' dismissal of the Mexican nationals' suit was without prejudice to any claims under Mexican law which may be brought in Mexico. Respondents understand that a motion to dismiss on the basis of the Louisiana courts' judgment remains pending in the Texas litigation.

*Coto v. J. Ray McDermott, et al.*, 98-1443 (La. 10/16/98), 726 So. 2d 904; 526 U.S. 1050 (1999). The Mexican national plaintiffs in the Texas litigation have asserted Mexican law claims which are subject to Texas state court procedure. Petitioners' Jones Act and general maritime law claims are subject to Louisiana procedural rules. Clearly, the Mexican national plaintiffs and the Petitioners herein are not similarly situated.

In this respect, Petitioners' reliance on *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (*per curiam*) is plainly misplaced. This Court granted *certiorari* in that case because of a conflict between the U.S. Court of Appeals for the Fourth Circuit and the U.S. Court of Appeals for the Fifth Circuit regarding a substantive standard of federal law. Here, there is no conflict between two United States appellate courts nor is there any conflict between a Louisiana court of last resort and a United States court of appeals. *Certiorari* under Rule 10(b) is simply not warranted.

**Rule 10(c) Considerations**

The McDermott Respondents respectfully submit that Petitioners' Writ of *Certiorari* does not warrant review under considerations of Rule 10(c) of the Rules of the Supreme Court. The trial court's decision to apply substantive maritime law through the procedural exception of *res judicata* does not conflict with relevant decisions of this Court. Indeed, the trial court's decision is consistent with this Court's decision in *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), which held that federal maritime law does not preempt state procedural law in Jones Act cases filed in state court under the saving to

suitors clause, 28 U.S.C. § 1333(1). In *American Dredging Co. v. Miller*, this Court focused on Louisiana's procedural rule of *forum non conveniens* and held:

> Uniformity of process (beyond the rudimentary elements of procedural fairness) is assuredly not what the law of the admiralty seeks to achieve since it is supposed to apply in all the courts of the world.

510 U.S. at 453. A bench trial through Louisiana's exception of *res judicata* does not infringe upon the substantive right to recover and does not deprive any litigant of procedural due process. Nor is Louisiana's procedural exception of *res judicata* "a rule upon which maritime actors rely in making decisions about primary conduct – how to manage their business and what precautions to take." 510 U.S. at 454. Because Louisiana's exception of *res judicata* is one of procedure rather than substance, Petitioners erroneously contend that the trial court's decision is in conflict with decisions of this Court.

There can be no doubt that an exception of *res judicata* is the *proper Louisiana procedural* vehicle when a suit is barred by a valid, written compromise or transaction. *Ortego v. State Dept. of Transp. & Develop.*, 689 So. 2d 1358 (La. 1997); *Brown v. Drillers, Inc.*, 630 So. 2d 741 (La. 1994); *Rivett v. State Farm Fire & Cas. Co.*, 508 So. 2d 1356 (La. 1987); *Harris v. Caddo Parish School Bd.*, 2002 La. App. LEXIS 3816 (La. App. 2 Cir. 2002); *Priority E.M.S. v. Crescent City E.M.S.*, 2002 La. App. LEXIS 3207 (La. App. 4 Cir. 2002); *Louisiana Workers Compensation Corp. v. Betz*, 792 So. 2d 763 (La. App. 4 Cir. 2001); *Childs v. Woods*, 822 So. 2d 732 (La. App. 1 Cir. 2002).

Louisiana jurisprudence establishes that the hearing of an exception in advance of trial does not deny any litigant a right to trial by jury. In *Shell Oil Co. v. Kennedy*, 344 So. 2d 1153 (La. App. 4 Cir. 1977), the Louisiana Fourth Circuit Court of Appeal affirmed the trial court's determination of the validity of a mutual release contained in a termination agreement through an exception of *res judicata*. On appeal, Kennedy contended that the factual issue as to the validity of the compromise is one for the jury and should not have been decided by the judge in advance of a trial on the merits. Citing the Louisiana Supreme Court's decision in *Babineaux v. Pernie-Bailey Drilling Co.*, 262 So. 2d 328 (La. 1972), which held that a plaintiff is not denied the right to trial by jury because Louisiana's procedural system requires or permits certain issues to be decided by the judge alone in advance of trial, the Fourth Circuit rejected Kennedy's contention and stated:

> While an argument for presenting all factual issues to the jury contains considerable merit, our procedural system apparently contemplates the use of devices such as the peremptory exception to avoid full-scale trial of actions which may be finally determined by the trial in advance of a conveniently separable issue. In the present case a decision sustaining defendant's exception disposes of the entire case without the necessity of a lengthy trial of such issues as contract breach and damages.

334 So. 2d at 1154. The Fourth Circuit affirmed the trial court's actions in determining the validity of the compromise on the exception of *res judicata* in advance of a trial on the merits. That Louisiana's exception of *res judicata* is procedural in nature is sufficient for denial of the Petitioners'

Writ. The remainder of Petitioners' arguments are equally without merit.

Petitioners incorrectly argue that the Jones Act adopts FELA decisional law which requires trial by jury on release issues involving railroad workers. First, the Jones Act specifically incorporates " . . . all statutes of the United States modifying or extending the common law right or remedy in cases of personal injury to railway employees . . . 46 U.S.C. § 688(a)." For this reason, it has been recognized that the Jones Act: adopts FELA's three-year prescriptive period, 45 U.S.C. § 56; does not recognize the defense of assumption of the risk, 45 U.S.C. § 54; provides that contributory negligence is not a complete bar to recovery but merely diminishes recovery based upon the seaman's comparative negligence, 45 U.S.C. § 53; and prohibits removal of Jones Act suits brought in state court, 28 U.S.C. § 1445(a).

Second, and more importantly, releases executed by railroad workers are governed by a different legal standard (FELA decisional law) from those releases executed by Jones Act seamen. Compare, *Callan v. Pennsylvania Railroad Co.*, 332 U.S. 625 (1948) (railroad worker's releases) with *Garrett v. Moore-McCormack,* 317 U.S. 239, 248 (1942) (seamen's releases). A FELA railroad worker attacking the validity of his release bears the burden of proving the release to be invalid, while the Jones Act employer bears the burden of proof in establishing the validity of a seaman's release.

The FELA cases applicable to railroad workers are factually and legally inapplicable here. Under careful scrutiny, neither *Callan, supra*, nor *Dice v. Akron, Canton & Youngstown Railroad Co.*, 342 U.S. 359 (1952), supports

Petitioners' proposition that a seaman's release can only be determined by jury trial in a Jones Act suit brought in a state court. Clearly, *Callan* is not dispositive as there was never any question of whether the FELA liability issues, including the release, were to be tried to a jury in that federal court suit. The right to trial by jury in a federal court FELA action is mandated by the Seventh Amendment which is not binding on the states. In *Callan*, the district court removed the issue of the release from the jury under the erroneous assumption that there was no factual dispute as to the permanency of the railroad brakeman's injury which the district court further incorrectly concluded would invalidate the release. The federal court of appeal found reversible error under the facts relating to the release and the railroad's contention that the release was valid notwithstanding the permanency of the alleged injury.

However, the issue before the United States Supreme Court in *Callan* was not whether the release was a jury question but rather which party to the FELA action, the injured employee or the railroad, bore the burden of proof in establishing the validity, *vel non*, of the release. The Supreme Court rejected the argument that the same legal standard applicable to Jones Act seamen (*Garrett v. Moore-McCormack*) should be applicable to FELA railroad workers and held:

> . . . the releases of railroad employees stand on the same basis as the releases of others. One who attacks a settlement must bear the burden of showing that the contract he has made is tainted with invalidity, either by fraud practiced upon him or by a mutual mistake under which both parties acted.

332 U.S. at 630. With respect to releases, *Callan* establishes that FELA substantive decisional law is not applicable in Jones Act cases.

*Dice v. Akron Canton & Youngstown Railroad, supra*, merely stands for the proposition that the validity of a release under the FELA is governed by federal law and not by an Ohio law contrary to that federal substantive law. There, the railroad denied negligence and asserted a release in defense of a railroad fireman's FELA negligence action brought in an Ohio state court. The trial judge entered a judgment notwithstanding the verdict and set aside the jury's verdict in favor of the fireman and found that the fireman's evidence did not support the allegation of fraud required to set aside the release. Before addressing Ohio's fragmented treatment of factual questions involving an allegedly fraudulent release, the Supreme Court first held that the validity of releases under the FELA raises a federal question to be determined by federal rather than state law. The Supreme Court next found that Ohio law was contrary to the substantive federal law:

> In effect, the Supreme Court of Ohio held that an employee trusts his employer at his peril, and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud. Application of so harsh a rule to defeat a railroad employee's claim is wholly incongruous with the general policy of the Act. . . .

342 U.S. at 362.

Turning to the issue of jury trial, the Supreme Court observed that under Ohio's law, "the factual issue of fraud is thus split into fragments, some to be determined by the judge, others by the jury." 342 U.S. at 362. Because Ohio

law provided for jury trials of cases brought pursuant to the FELA, the Supreme Court held that Ohio could not "single out one phase of the question of fraudulent release for determination by a judge rather than by a jury." 342 U.S. at 362. *Dice* is clearly distinguishable from the case here where Louisiana's exception of *res judicata* does not result in fragmentation of factual issues between the judge and jury with respect to the validity of a seaman's release. This Court's decision in *Dice* clearly inferred that Ohio could have procedurally done away with jury trials in negligence actions, including an FELA action if it had seen fit to do so. 342 U.S. at 362, citing *Minneapolis and St. L.R. Co. v. Bombolis*, 241 U.S. 211 (1916).

Accordingly, the United States Supreme Court has recognized that any state, in entertaining an action under the FELA, need not provide a jury system other than that established for local negligence actions and that states are not compelled to provide the jury required of federal courts by the Seventh Amendment. *Minneapolis and St. L.R. Co. v. Bombolis*, 241 U.S. 211 (1916). Stated differently, if a state has modified the common law requirement for trial by jury, a litigant must accept the jury system as he finds it in bringing his FELA suit in that state's court. *Minneapolis and St. L.R. Co. v. Bombolis, supra*. Because all negligence suits in Louisiana are treated the same way and by the same mode of disposition, Louisiana does not discriminate against FELA, or Jones Act suits for that matter. All civil suits in Louisiana, including Jones Act suits, are subject to the exceptions set forth in Louisiana Code of Civil Procedure. Nor does Louisiana's procedural law concerning jury trials make any inroad upon federal substantive law. *Parker v. Rowan Companies*, 599 So. 2d 296 (La. 1992), *cert. denied*, 506 U.S. 871 (1992). After all, Petitioners could have brought their Jones Act claims in

federal court if they were not content with Louisiana's procedural rules.

In 1992, the Louisiana Supreme Court and the U.S. Fifth Circuit Court of Appeals both considered the effect of former article 1732(6) of the Louisiana Code of Civil Procedure in a state court Jones Act suit brought pursuant to the saving to suitors clause; both courts independently held that a bench trial does not modify or displace essential features of the Jones Act or the substantive maritime law. *Parker v. Rowan Companies, supra; Linton v. Great Lakes Dredge & Dock Company*, 964 F.2d 1480 (5th Cir. 1992). This Court's decision in *Parker* is instructive and rejects Petitioners' argument that the right to trial by jury is substantive and not remedial or procedural:

> Defendant's alternative argument is that if 1732(6) is construed as encompassing Jones Act claims, then the statute itself violates the supremacy clause of the United States Constitution, the Seventh Amendment, and the provisions of 28 U.S.C. § 1333. The arguments which he uses to support these contentions do not persuade us. The Seventh Amendment's right to trial by jury in civil cases has not been extended to the states through the Fourteenth Amendment. *Olsen v. Trust Co. of Chicago*, 245 F.2d 522 (7th Cir.), *cert. denied*, 355 U.S. 896, 78 S.Ct. 270, 2 L.Ed.2d 193 (1957). *See also Letendre v. Fugate*, 701 F.2d 1093, 1094 (4th Cir. 1983) (citations omitted). A denial of a jury trial in a state court civil proceeding does not violate the due process clause. *Id.* Therefore, it is within the province of the states to establish their own rules for the availability of jury trials. This court, in *Lavergne v. Western Co. of North America, Inc.*, rejected the reverse-Erie argument, stating:

> It has long been established that a state court, having concurrent jurisdiction with the federal courts as to *in personam* admiralty claims, is free to adopt such remedies and attach to them such incidents as it sees fit so long as it does not attempt to modify or displace essential features of the substantive maritime law. . . . Affording a litigant a right to trial by jury in our state courts does not . . . modify or displace essential features of the substantive maritime law. As stated by Judge (now Justice) Blanche in *Hebert v. Diamond M. Company*, [367 So. 2d 1210 (La. App. 1 Cir. 1978)], '[a] jury trial is simply a method of enforcing substantive rights. *As such, it is purely remedial . . .*'
>
> 371 So. 2d 808, 810 (La. 1979) (citations omitted). Similarly, granting a Jones Act seaman a right to a state court bench trial does not "modify or displace essential features of the substantive maritime law."

559 So. 2d at 301 (emphasis added). This same rationale and the remedial nature of a jury trial reinforces the trial court's decision to hear the release issue in advance of trial under Louisiana's procedural exception of *res judicata*.

Just after the *Parker* decision was issued, the U.S. Fifth Circuit Court of Appeals held that a non-jury trial in a Jones Act suit brought in a Louisiana court pursuant to the saving to suitors clause did not infringe upon the Jones Act or the general maritime law. *Linton v. Great Lakes Dredge & Dock Co., supra*. The *Linton* court noted that the United States Supreme Court had addressed

state court concurrent jurisdiction in Jones Act and general maritime law cases and held:

> . . . a state, having concurrent jurisdiction, is free to adopt such remedies and to attach to them such incidents, it sees fit so long as it does not attempt to make changes in the substantive maritime law.

964 F.2d at 1486, citing *Madruga v. Superior Court*, 346 U.S. 556 (1954); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 190 (1924). Interpreting the Louisiana Code of Civil Procedure, and relying on *Madruga* and *Red Cross Line*, the U.S. Fifth Circuit Court of Appeals concluded that a non-jury trial in state court is not, in and of itself, offensive to the general maritime law:

> In view of the revised wording of the 'saving to suitors' clause and Supreme Court authority, *a jury trial is not a required element of a 'saving to suitors' remedy.*

964 F.2d at 1491 (emphasis added). Therefore, a Louisiana court having concurrent jurisdiction and presented with the issue of a seaman's release, is free to adopt such remedies – the exception of *res judicata* – and to attach such incidents – a judge determination in advance of trial – so long as the court applies the substantive maritime law of *Garrett v. Moore-McCormack*, applicable to Jones Act releases. This is precisely the effect of the trial court's January 22nd Decision and Order setting the exceptions for bench trial.

The Louisiana legislature's subsequent modification of article 1732 is not contrary to Respondents' reliance on *Parker* and *Linton*. The rationale of *Parker* and *Linton* remains valid for the proposition that the right of either

party to a trial by jury in a seaman's suit against his employer in state court is determined by Louisiana procedural rules. *Callais v. Vizier Inc.*, 2000 U.S. Dist. LEXIS 3326 p. 2 (E.D.La. 2000).

Actually, the Louisiana legislature's subsequent modification of article 1732 deleting subsection (6), supports the proposition advanced by Respondents that Louisiana procedure determines the availability of jury trials in Jones Act cases brought in state court. When enacting article 1732(6), the Louisiana legislature amended article 1732 to give a plaintiff/seaman the control of trial by jury in state court: "Louisiana apparently attempted to track the federal system and to give injured seamen who choose to file in state court the same choice of jury or bench trial as they would have in federal court." *Hahn v. Nabors Offshore Corp.*, 820 So. 2d 1283 (La. App. 3 Cir. 2002), citing, *Parker*, *supra*. However, by Acts 1999, No. 1363, § 1, the legislature deleted subsection (6) from article 1732, allowing either the plaintiff or the defendant to choose a jury trial in a state court Jones Act case. As a result, a Jones Act seaman does not have the same right to elect a jury or non-jury trial in a Louisiana court as he does in a federal court. *Hahn v. Nabors Offshore Corp.*, at 1284.

In *Hahn*, the injured seaman challenged the 1999 amendment as violative of his exclusive federal right to choose the mode of trial for Jones Act and general maritime law claims brought in state court. *Id.* While the Louisiana Third Circuit Court of Appeal did not question a seaman's exclusive right to choose a jury or non-jury trial in federal court, it held that the seaman's decision to bring his suit "in state court under the saving to suitor's clause," subjected his suit to state procedural rules which eliminated

his right to choose. With respect to the 1999 amendment to article 1732, the Third Circuit cited *Parker's* holding that "it is within the province of the states to establish their own rules for availability of jury trials" without modifying or displacing the essential features of the Jones Act and general maritime law. *Hahn* at 1285.

Other Louisiana appellate decisions establish that the application of the exception of *res judicata* to a seaman's release is not a novel concept in Louisiana jurisprudence. In *Dearman v. Mallard Bay Drilling Company, Inc.*, 616 So. 2d 866 (La. App. 3 Cir. 1993), the Third Circuit held that Louisiana's exception of *res judicata* was the proper procedural vehicle to determine the validity of a seaman's release in a Jones Act and general maritime law suit brought in Lafayette Parish pursuant to the saving to suitors clause. In that case, the plaintiff injured his back while working aboard defendant's jack-up vessel. Plaintiff contacted defendant requesting settlement, met with defendant's claims manager, negotiated and, while under oath before a court reporter, entered into a settlement for $22,500.00.

Subsequently, plaintiff hired an attorney and filed suit seeking damages under the Jones Act and general maritime law. Defendant filed an exception of *res judicata* to the claims of plaintiff on the basis that the seaman entered into a settlement and released all of his claims under the Jones Act and general maritime law. After an evidentiary hearing, the trial court sustained Mallard's exception of *res judicata* and dismissed plaintiff's suit. The Third Circuit held that the exception of *res judicata* was the appropriate procedural method for evaluating the seaman's release and that the trial court correctly sustained defendant's exception of *res judicata*. 616 So. 2d at 868.

Likewise, a seaman's suit, filed after settlement, was dismissed through an exception of *res judicata* by the trial judge in Jefferson Parish and the Louisiana Court of Appeal for the Fifth Circuit affirmed. *LeBlanc v. Callais, Inc.*, 767 So. 2d 823 (La. App. 5 Cir. 2000). In that case, plaintiff brought suit in state court under the Jones Act and general maritime law arising out of personal injuries allegedly sustained in a vessel collision. Prior to filing the suit in Jefferson Parish, the plaintiff had intervened in a federal court action regarding the same vessel collision and asserted a claim for loss profits. Plaintiff's claims in the federal court suit were settled before plaintiff brought his state court action. The state trial court maintained defendant's exception of *res judicata* based upon the plaintiff's settlement in the federal court suit. Affirming, the Fifth Circuit held that the exception of *res judicata* was the proper procedural device for determining the validity of the seaman's release under the appropriate federal maritime law. 767 So. 2d at 826. As demonstrated above, the trial court's hearing of the exception of *res judicata* under Louisiana Code of Civil Procedure article 929 neither conflicts with, nor displaces the substantive Jones Act or general maritime law.

In this suit filed in state court under the Jones Act, 46 U.S.C. § 688, and the "saving to suitors clause," 28 U.S.C. § 1333(1), federal maritime law does not preempt state procedural law. *American Dredging Co. v. Miller, supra.* State procedural rules apply in Jones Act cases brought in state court. *Milstead v. Diamond M Offshore, Inc.*, 676 So. 2d 89 (La. 1996) (applying the Louisiana standard of appellate review); *Cantrelle v. Kiva Const. & Eng., Inc.*, 630 So. 2d 265 (La. App. 1 Cir. 1993) (Louisiana may establish its own rules as to availability of jury trial in

Jones Act cases); *Dozier v. Ingram Barge Company*, 706 So. 2d 1064 (La. App. 4 Cir. 1998) (Louisiana procedural rules apply to the Jones Act prescriptive period); and *Morris v. M/V CREOLE BELLE*, 394 So. 2d 727 (La. App. 3 Cir. 1981) (Louisiana procedural rules govern default judgments in Jones Act cases).

An exception of *res judicata* neither conflicts with, nor displaces the substantive federal maritime standards governing the validity of a seaman's release. An exception of *res judicata* will be determined by the court. La. Code of Civil Proc. art. 929. Plaintiffs are "not denied a trial by jury in Louisiana simply because, under our Code of Civil Procedure, certain issues of law are either required or permitted to be disposed of by the judge alone in advance of the trial of the case." *Babineaux v. Pernie-Bailey Drilling Co.*, *supra* at 235; *see also, Shell Oil Co. v. Kennedy*, *supra*.

In an exception of *res judicata*, the party urging the exception of *res judicata* based on compromise bears the burden of proof with respect to the elements of the compromise. *Schmidt v. Doe*, 514 So. 2d 614 (La. App. 4 Cir. 1987). Likewise, under the general maritime law, the burden is upon the one who asserts the validity of a seaman's release to show that it was executed freely without deception or coercion, and that it was made by the seaman with a full understanding of his rights. *Garrett v. Moore-McCormack*, 317 U.S. 239 (1942). Accordingly, a hearing on the exception of *res judicata* will not infringe upon the substantive maritime law because the court will apply the maritime standards set forth in *Garrett v. Moore-McCormack*. A seaman may compromise his rights without prior judicial approval of the fairness of the

agreement. *Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1160-61 (5th Cir. 1985).

Respondents acknowledge that the right to trial by jury is available for a maintenance and cure claim, as well as an unseaworthiness claim, when joined with a Jones Act claim. *Fitzgerald v. United States Lines Co.*, 374 U.S. 16 (1963). This concept is of no significance to the issue presented as the existence of a maintenance and cure claim does not afford a seaman any greater right to a jury trial. It is well-settled that claims for maintenance and cure, including future maintenance and cure, can be settled through a Jones Act release. *Law v. United Fruit Co.*, 264 F.2d 498, 500 (2nd Cir. 1959); *Zoldan v. American Export Isbrandtsen Lines, Inc.*, 302 F.Supp. 388, 391 (S.D.N.Y. 1969); *Braxton v. Zapata Offshore Co.*, 684 F.Supp. 921 (E.D.Tex. 1988); *Pereira v. Boa Viagem Fishing Corp.*, 11 F.Supp. 2d 151 (D.Mass. 1998); *Grace v. Zapata Offshore Co.*, 653 So. 2d 704 (La. App. 4 Cir. 1995). It is also established that a seaman's release may validly cover the subsequent development of a medical condition related to the injury but of which the seaman is unaware at the time of executing the release. *Simpson v. Lykes Bros. Inc.*, 22 F.3d 601 (5th Cir. 1994).

## CONCLUSION

Respondents respectfully submit that the exception of *res judicata* is the appropriate procedural device for determining the validity of a seaman's release in advance of trial. State procedural rules apply to Jones Act cases brought in state court pursuant to the saving to suitors clause. *American Dredging Co. v. Miller, supra.* Louisiana

jurisprudence establishes that a plaintiff is not denied the right to jury trial by the hearing of a dispositive exception in advance of trial. Respondents have demonstrated that the Louisiana Supreme Court and the U.S. Fifth Circuit Court of Appeals have held that a non-jury trial in a Jones Act case brought in state court pursuant to the saving to suitors clause does not infringe upon the substantive Jones Act and general maritime law. A trial court is required by the Louisiana Code of Civil Procedure to hear a peremptory exception of *res judicata* and has the discretion to do so prior to trial on the merits. Accordingly, the trial court acted well within its judicial discretion in scheduling a hearing on the validity of the Petitioners' releases through Respondents' Exception of *Res Judicata* in advance of trial.

Respectfully submitted,

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